

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-6109 ^B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET No. 77-6109

ANTHONY B. CATALDO and
ADA W. CATALDO,

Appellants,

- against -

DAVID P. LAND,
T. GORMAN REILLY and
ROBERT LEVINE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAGINATION AS IN ORIGINAL COPY

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Cataldo-

2 do you get \$50?

3 MR. CATALDO: This is an estimate, Judge, \$50.

4 THE COURT: Any other proof?

5 MR. CATALDO: For example, they have an annual
6 dinner and they have -- yes, at this time we are active
7 in a couples club.

8 THE COURT: They have a meeting once a month?

9 MR. CATALDO: Once every two weeks.

10 THE COURT: You go?

11 MR. CATALDO: I go.

12 THE COURT: You eat?

13 MR. CATALDO: No.

14 THE COURT: But you don't eat?

15 MR. CATALDO: There's an admission charge to it.

16 THE COURT: What do they do, have entertainment?

17 MR. CATALDO: Yes. They try to mix people
18 together at the church and they might have some entertain-
19 ment or some phonograph music, something like that.

20 THE COURT: All right.

21 Is that all you want to say?

22 MR. CATALDO: I was secretary of that couples
23 club.

24 THE COURT: Is that all you want to say?

25 MR. CATALDO: I estimated \$50. That's all.

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Cataldo

2 THE COURT: Mr. Reilly.

3 BY MR. REILLY:

4 Q Mr. Cataldo, do you have any dates as to the
5 functions that you attended?

6 A No, I did not make notes of the dates.

7 Q Did you keep any recording of these functions at
8 all?

9 A Did I do what?

10 Q Did you make any recording of these functions
11 that you attended?

12 A No. These were estimates I said I made
13 because having attended them, I tried to estimate them.
14 They are true. My testimony is true.

15 THE COURT: You don't need to say that. Strike
16 that.

17 MR. REILLY: No further questions.

18 THE COURT: It's disallowed. So ordered. At
19 least it will be in the findings.

20 What other item of this character?

21 MR. CATALDO: Our Lady Queen of Martyrs Church.

22 THE COURT: What is that for?

23 MR. CATALDO: That is a Roman Catholic Church
24 that I go to.

25 THE COURT: What is the deduction?

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2 MR. CATALDO: \$200. I put various amounts in a
3 plate from two to \$5, on some occasions a \$10-bill. That
4 I estimated at \$200.

5 THE COURT: No record of it made by you any-
6 where?

7 MR. CATALDO: I'm not supposed --

8 THE COURT: I didn't ask you that. Answer my
9 question.

10 MR. CATALDO: I have no record of what I con-
11 tributed to the church.

12 THE COURT: Say so. Yes, that is the testimony.
13 Mr. Reilly.

14 BY MR. REILLY:

15 Q During 1963, Mr. Cataldo, how often did you
16 attend church?

17 A What's that?

18 Q How often in 1963 did you attend Our Lady Queen
19 of Martyrs Church.

20 A Every day of obligation.

21 THE COURT: What does that mean? Explain it.

22 THE WITNESS: I will.

23 THE COURT: How often did you attend church?

24 THE WITNESS: It's a proper answer because every
25 time -- the church has rules about when to attend church.

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2 They are called days of obligation. That's why I referred to
3 them as days of obligation. ;

4 THE COURT: How many days of obligation were
5 there in '63?

6 THE WITNESS: There are about eight during the
7 week and approximately 52 in the year.

8 THE COURT: Did you go to all of them?

9 MR. CATALDO: No.

10 THE COURT: Then they weren't very strong
11 obligations.

12 Go on.

13 THE WITNESS: I didn't go to Our Lady Queen of
14 Martyrs.

15 THE COURT: Don't argue. Please stick to facts.

16 MR. CATALDO: Your Honor makes remarks that
17 are not pertinent.

18 THE COURT: No, I am making pertinent remarks.

19 MR. CATALDO: It shows a frame of mind of bias.

20 THE COURT: It isn't bias, it's an attempt to
21 get the facts and the truth. You seem to be very apt to
22 try to evade.

23 MR. CATALDO: I'm not evading, I'm trying to
24 tell the truth.

25 THE COURT: How many times did you go?

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2 MR. CATALDO: I estimated I spent \$200,
3 whether I went to Our Lady Queen of Martyrs or whether I
4 went to the church in Long Beach where I generally go
5 during the summer. So I just estimated it at \$200. An
6 very often I buy tickets for the bridge.

7 THE COURT: That is a questionable deduction.
8 That is not involved.

9 MR. CATALDO: That's a charitable contribution.
10 Anything you do when you buy anything from a church for a
11 church function --

12 THE COURT: You don't need to argue it. I am
13 not going to listen any further.

14 You have concluded on facts then, have you?

15 MR. CATALDO: Yes.

16 THE COURT: All right, Mr. Reilly.

17 BY MR. REILLY:

18 Q Mr. Cataldo, does Our Lady Queen of Martyrs
19 and the other church that you attended in Long Beach use
20 envelopes?

21 A No.

22 Q They did not use envelopes in 1963?

23 A No.

24 Q In your practice have you been to other churches
25 other than these two churches?

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Cataldo

357

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A I have been to many, many, many churches.

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Q Have you observed that it's the general custom to use envelopes to identify the name of the parishioner?

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A No, it's not a general custom.

6

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MR. REILLY: Your Honor, I just move to disallow it.

8

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THE COURT: Yes. I must. There is insufficient proof. Disallowed.

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Next item, if any.

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MR. CATALDO: I am entitled to certain deductions for charity even under the regulations of the department. This wholesale disallowing of the deductions - -

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THE COURT: They have to be proved at least with a reasonable degree of probability.

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MR. CATALDO: My statement is proof. There's no contradictory proof, only a question - -

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THE COURT: That is not the point.

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MR. CATALDO: I'm going to say that Mr. --I'm going to be able to prove to your Honor that in this litigation Mr. Reilly has been wholly irresponsible in the presentation --

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THE COURT: Listen, if there's anything further I said for you to put it in the briefs after this hearing.

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MR. CATALDO: I will.

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358

1 THE COURT: You just talk yourself into paying
2 a whole lot of record money if you go on like this.
3

4 MR. CATALDO: Boys Club of Brooklyn.
5

6 THE COURT: Boys Club?
7

8 MR. CATALDO: It's supposed to be Home of
9 Brooklyn. I wrote club. That's where Judge Bruchhausen's
10 wife is.
11

12 THE COURT: I am not concerned where Judge Bruch-
13 hausen's wife is. Strike that out. You go astray in the
14 most amazing way.
15

16 MR. CATALDO: I'm trying to explain it.
17

18 THE COURT: I know. It's irrelevant.
19

20 MR. CATALDO: There we go to functions.
21

22 THE COURT: What is the claim? What is the
23 money claim?
24

25 MR. CATALDO: \$25.
26

27 THE COURT: For what?
28

29 MR. CATALDO: For the contributions I made to that
30 home in cash.
31

32 THE COURT: When?
33

34 MR. CATALDO: In '63.
35

36 THE COURT: Yes, but when?
37

38 MR. CATALDO: My wife has become a member of
39 the board of directors and we have contributed more money to
40

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2 that.

3 THE COURT: Any more proof?

4 MR. CATALDO: On the Women's League --

5 MR. REILLY: May I examine on that, your Honor?

6 THE COURT: This is all on this Boys Club of
7 Brooklyn; is that so?

8 MR. CATALDO: Yes

9 THE COURT: All right. Cross-examination.

10 BY MR. REILLY:

11 Q Mr. Cataldo, do you have your Exhibit 25, list
12 of claimed expenditures?

13 A No, I don't. The Court has it.

14 THE COURT: The Court doesn't have it.

15 Q Did you claim a deduction of \$40 as item number
16 9 on that?

17 A That was a special occasion that I paid by cash.

18 Q That was Brooklyn Home for Boys?

19 A That was the same thing. It's the same charity.

20 Q Didn't you present a check to show that?

21 A Yes, sir.

22 Q I call your attention to item number 225 on
23 your list, Brooklyn Home for Boys \$20 contribution.

24 A Yes, that was another function.

25 Q That is a total of \$60?

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A \$60 in checks, yes.

Q Is this \$25 that you are claiming on your itemized deduction part of that \$60?

A Yes. For example, we bought flowers at one meeting.

Q What day was that?

A That was for cash.

THE COURT: You took the flowers home? Did you take the flowers home?

THE WITNESS: No.

THE COURT: What did you do with it?

THE WITNESS: I took it to the home and left it there.

THE COURT: Where?

THE WITNESS: I took it to the home and left it there.

THE COURT: All right.

Q Do you have any record of the contribution?

A I have no record of the cash contributions. These were things that I figured out when I was making out my income tax of what cash disbursements I had made during the year, I put them down as best as I could from memory.

Q All right.

MR. REILLY: Your Honor, the government just

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2 wishes to allude to the fact that there are two substantiated
3 deductions to the Brooklyn Home for Boys other and apart
4 from this claimed deduction which the government has allowed.
5 We feel that the absence of proof here requires that this
6 expenditure of \$25 be disallowed.

7 MR. CATALDO: That's one of the things in the
8 deficiency judgment. The government didn't allow those two
9 items as deductions at all until -- at the very end on the
10 eve of trial.

11 THE COURT: What about the allowances, have they
12 been credited?

13 MR. REILLY: They have been credited, your Honor.
14 This goes to our argument that those that have been
15 credited shouldn't be credited to business deductions but
16 to itemized deductions.

17 THE COURT: Let it be so. I am concerned now
18 only with this \$25-cash item here.

19 MR. REILLY: We have no further questions.
20 Our position is it should be disallowed. There is no
21 substantiation.

22 THE COURT: So directed. So ordered. It's dis-
23 allowed. It's not proof. That is \$25 to the Brooklyn Home
24 for Boys, I believe the term is; is that right?

25 MR. CATALDO: That's right.

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THE COURT: Anything else in this category?

MR. CATALDO: The next item is a \$15 contribution
I made --

THE COURT: To whom?

MR. CATALDO: To the Women's League. I paid it--

THE COURT: Women's League of what? Where is it?

MR. CATALDO: Women's League of Voters.

THE COURT: Since when has that been a charitable
deduction?

MR. CATALDO: Well, this is an organization--

THE COURT: I know what it is. I will take judicial
notice as to what the League of Women Voters is.

First, is there any proof of payment? \$15,
you say.

MR. CATALDO: Proof of payment?

THE COURT: Yes.

MR. CATALDO: I say that I paid this \$15 to
a woman in my neighborhood who collects for the Women's
Voters.

THE COURT: Did you get any receipt?

MR. CATALDO: No.

THE COURT: All right.

That is all you want to say?

BY MR. REILLY:

Q Mr. Cataldo, how many contributions did you make

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Cataldo

2 to the Women's League of Voters in 1963?

3 A I believe -- I don't know. One or two or
4 something.

5 Q One or two?

6 A Yes.

7 Q Is it one or is it two?

8 A I'm not sure.

9 Q Do you recall when this contribution was made,
10 when your contributions were made?

11 A Yes. This lady --

12 THE COURT: When, he said; not the lady.

13 A (Continuing) You mean the date? No, I don't
14 remember.

15 Q Do you recall the time of year?

16 A No, I don't remember.

17 Q Was it around election time?

18 A No.

19 Q Was it around election time?

20 A No.

21 Q Did you make any contributions to this lady
22 around election time?

23 A No. I might have. I don't know.

24 THE COURT: All right. "I don't know" is the
25 answer.

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364

2 MR. REILLY: Your Honor, we move to disallow
3 that expenditure.

4 THE COURT: It must be disallowed. There is not
5 sufficient proof.

6 Any more such items?

7 MR. CATALDO: Well, I claimed there is collec-
8 tions at the door.

9 THE COURT: Where, to whom?

10 MR. CATALDO:: By collectors who collect for
11 the Heart Fund for all kinds of things.

12 THE COURT: Yes. All kinds. That's a good name
13 for it.

14 How much?

15 MR. CATALDO: I claimed \$150. For example, we
16 have a celebration --

17 THE COURT: I don't want examples. I want
18 statements of what you claim as to which organization. You
19 go on and on and on.

20 MR. CATALDO: There's an Forest Hills Garden
21 Celebrations Committee which is given to providing gifts
22 for Children at Christmastime. There is the various
23 Salvation Army, the Red Cross --

24 THE COURT: I know there are scores of organiza-
25 tions, but the question is: What proof have you got?

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365

2 MR. CATALDO: I have my statement. I tell the
3 truth. I don't have a receipt and this was paid in cash.
4 What more can I do? The government acknowledges that
5 these things are done all the time and they don't want
6 proof. Mr. Reilly is asking for proof here.

7 THE COURT: I am not calling upon you to argue
8 this.

9 Are you through with your statements as to this,
10 whatever it is? It's all vague to me.

11 MR. CATALDO: I estimated \$150 and I told you --

12 THE COURT: It's to various organizations; is
13 that right?

14 MR. CATALDO: That's what it says here. I told
15 you under oath that they collected during the year for
16 various things like the Heart Fund and Tuberculosis Fund.
17 You name it, they have been at our door.

18 THE COURT: I think it's you who should name
19 it, not me.

20 MR. CATALDO: We don't mind paying it. We are
21 certainly entitled --

22 THE COURT: I suppose not.

23 MR. CATALDO: -- credence to the contributions
24 that we make.

25 THE COURT: Are you through now with your facts

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Cataldo

366

2 about it?

3 MR. CATALDO: Yes, sir.

4 THE COURT: All right.

5 What do you say, Mr. Reilly?

6 BY MR. REILLY:

7 Q Mr. Cataldo, when they come at your door and
8 you give them a contribution, do any of these collectors
9 give you a receipt?

10 A Yes, sometimes we get a receipt.

11 Q Did you keep a receipt for any of these expendi-
12 tures that you are claiming?

13 A I don't know. I don't believe we did. I think
14 we might have disregarded the receipt we got whenever we got
15 them.

16 MR. REILLY: No further questions.

17 THE COURT: Disallowed; no sufficient proof.

18 Any more in this category? I asked you if there
19 are any more in this category?

20 MR. CATALDO: It's not my problem. I didn't
21 submit this problem at all.

22 THE COURT: It is my problem and you are expected
23 to answer the Court.

24 I will note now that this area is ended.

25 What else is there, Mr. Reilly?

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MR. REILLY: We could proceed then to the second question, which is a more limited one. Our position is that contributions that have been allowed on this list of claimed expenditures should not be allowed as business deductions but as itemized deductions. I will give an example --

THE COURT: I don't want any examples, I want the items.

Where are they?

MR. REILLY: On 24.

THE COURT: What number?

MR. REILLY: 9, Brooklyn Home for Boys.

THE COURT: That is \$40. What others?

MR. REILLY: 14, Boy Scouts of America, \$18.

16, Women's Guild of the Church in the Gardens, \$5.50.

THE COURT: That was probably a luncheon or something.

What else?

MR. REILLY: 47, Church in the Gardens, \$10.

60, Mount Manresa, \$10. 110, Mount Manresa,

\$25. 151, Church in the Gardens, \$43.

THE COURT: That is to Reverend Joseph McKloskey?

MR. REILLY: Yes; \$10..

I skipped one, 160, Big Brothers, Inc., \$10.

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Cataldo

368

191, Bay Ridge Methodist Church, \$10. 197, YMCA
Scholarship, \$15. 225, Brooklyn Home for Boys, \$20.
278, Highland Park YMCA --

THE COURT: I don't understand how you could
really live, counsellor, making all these alleged con-
tributions.

MR. CATALDO:: I can answer that question.

THE COURT: You don't need to answer it.

MR. REILLY: 329, League of Women Voters, \$15.
364, Celebration Association of Forest Hills, \$5. That
is the list.

Your Honor, our calculations indicate that this
list amounts to \$303.

THE COURT: What do we have to do here now?

MR. REILLY: The only thing we have to do,
your Honor, is to determine whether these are allowable
as business deductions or as itemized deductions.

THE COURT: Is it one or the other?

MR. REILLY: It's itemized deductions, which is
the government's contention.

THE COURT: I don't know. You have got me
into one mountain of a trial over these minute items here.
If I had known this was it, I certainly would have
rejected this case. It's become almost a nightmare here the

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2 way it's presented, the items which are involved.

3 What do we have to do, go over and listen to
4 Mr. Cataldo with respect to what proof he has on these?

5 MR. REILLY: Your Honor, I just ask for a ruling
6 of law that no charitable deduction may be allowed as a
7 business deduction.

8 THE COURT: I can't make that as a general rule.

9 MR. REILLY: I refer you then to Section 162 of
10 the Code which says there will be no allowable deductions
11 for contributions.

12 THE COURT: What does it say? You mean they
13 should be shown, if at all, as charitable?

14 MR. REILLY: That is correct, your Honor.

15 THE COURT: I would think that none of these
16 which you mentioned are business deductions really.

17 MR. CATALDO: I have --

18 THE COURT: Keep still, will you. I didn't ask
19 you to say anything.

20 MR. REILLY: I allude to Section 162, which is
21 the basic trade or business expense section. 162-B says:

22 "Charitable Contributions and Gifts Accepted -
23 No deductions shall be allowed under subsection A for
24 any contribution or gift which would be allowable as
25 a deduction under Section 170."

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370

1 THE COURT: That is charitable?

2 MR. REILLY: Yes.,

3 MR. CATALDO: I would like to offer some proof
4 here --

5 THE COURT: You mean to show they are charitable
6 deductions?

7 MR. CATALDO: To show they are business expenses.

8 THE COURT: I will not take it. There has
9 to be an end to some of this filibustering here.

10 MR. CATALDO: Making decisions against me for
11 the sake of making an end --

12 THE COURT: The law requires it, counsellor.
13 I am trying to follow the law. You are roaming around.

14 MR. CATALDO: I'm trying to tell you --

15 THE COURT: Do you want to pay for all this
16 record?

17 MR. CATALDO: I have to do what I have to do.

18 THE COURT: You are a compulsive talker, I guess.

19 MR. CATALDO: No, sir.

20 THE COURT: I am not going to listen. It's a
21 matter of law. I have decided it.

22 MR. CATALDO: It isn't a matter of law.

23 THE COURT: Will you please just sit down for
24 a while.
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Cataldo

371

2 MR. CATALDO: Mr. Reilly is misleading you as
3 to the law. I can't protect myself.

4 THE COURT: Strike that out. He is not mis-
5 leading me at all.

6 Mr. Reilly, should we take proof now as to the
7 charitable nature of these?

8 MR. REILLY: No, your Honor. We have consider-
9 ed that these are allowable as charitable deductions?

10 THE COURT: So that's a credit; is that so?

11 MR. REILLY: Yes.

12 THE COURT So it's not necessary to do anything
13 else?

14 What else is there, Mr. Reilly, that we should
15 take up? I will ask you.

16 MR. REILLY: The next issue is the question of
17 interest expense.

18 THE COURT: These are itemized deductions which
19 you have allowed, right?

20 MR. REILLY: That is correct, your Honor.

21 THE COURT: So there's no sense in the proof
22 here, attempting any further proof about it.

23 Will you please sit down?

24 MR. CATALDO: All right. You are deciding
25 against me. You don't permit me to explain --

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3 THE COURT: It's a matter of law. I am not
4 going to have you explain anything. The items speak for
5 themselves.

6 MR. CATALDO: There's --

7 THE COURT: You have already been adjudged in
8 contempt and to pay \$50. If this goes on any further, it
9 is going to be increased. I am not going to take this from
10 you, sir. No court can conduct a case with the attitude
11 which you display.

12 What else do we have, Mr. Reilly?

13 MR. REILLY: The question of interest charges.

14 THE COURT: All right.

15 Was there a claim for interest?

16 MR. REILLY: Yes. In this 25 for identification
17 submitted by plaintiff --

18 THE COURT: What items?

19 MR. REILLY: It should be 24 then, your Honor.
20 These are too numerous to mention. They are listed as
21 interest expenses.

22 THE COURT: Are they combined somewhere?

23 MR. REILLY: They are not combined.

24 If you turn to page 2, your Honor, item 28, for
25 example, and 29 says \$25 --

THE COURT: All right. I suppose we will have to

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2 go down the whole list.

3 What else can we do?

4 MR. REILLY: The government has conceded that
5 there's \$1,878.72 in these lists of interest charges. We
6 concede they were paid and do not concede they were business
7 expenses.

8 THE COURT: Then it's useless to say anything
9 about it except to go on with this case and let the plaintiff
10 testify about them.

11 MR. REILLY: He would have to testify to show
12 that somehow these were business oriented.

13 THE COURT: I have to ask you to proceed with
14 every item and tell us what it is. They were paid, but
15 you don't know to whom; is that it?

16 MR. REILLY: We know to whom, but the purpose--

17 THE COURT: All right.

18 MR. CATALDO: I would like to testify my way,
19 please.

20 THE COURT: You are not going to testify your
21 way.

22 MR. CATALDO: As to facts; yes, sir. I will ask
23 myself questions.

24 THE COURT: All right. You proceed and tell the
25 purpose of one of these interest payments. What else can

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Cataldo

374

2 I do?

3 They are payments to different persons, aren't
4 they, Mr. Reilly?

5 MR. REILLY: My understanding from reviewing
6 Mr. Cataldo's checks is that they relate to the same series
7 of loans. There may be two or three loans in total, so
8 that it would be possible --

9 THE COURT: Is it possible to group them?

10 MR. REILLY: It's possible to group them. I
11 think we can save some time --

12 THE COURT: I would like to save time. How are
13 you going to save time?

14 MR. REILLY: By asking Mr. Cataldo how many loans
15 did he pay interest on during 1963 and what was the nature
16 of the loans.

17 THE COURT: All right.

18 What loans did you pay in 1963?

19 MR. CATALDO: I would like to answer my own questions
20 on this.

21 THE COURT: All right. You ask the questions
22 and Mr. Reilly may object to the form of the question or to
23 the relevancy. I am not going to let you drift around.

24 What is the first one you want to ask yourself?

25 MR. CATALDO: Yes, sir. Whether or not notice of

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Cataldo

375

1 deficiency allowed these interest charges claimed here--

2 THE COURT: Are you asking yourself?

3 MR. CATALDO: Yes, sir.

4 MR. REILLY: Objection, your Honor.

5 THE COURT: Sustained.

6 I will ask Mr. Reilly a question. I will ask
7 the same question of you.

8 Mr. Reilly, what did the deficiency notice do
9 with these loans?

10 MR. REILLY: The deficiency notice treated them
11 as itemized deductions.

12 THE COURT: What does that mean?

13 MR. REILLY: That means that in computing what
14 Mr. Cataldo's professional income was, they did not treat
15 that as a deduction. They treated it as an itemized
16 deduction from his taxable income.

17 THE COURT: Does that mean there must be proof?
18 I am confused by your statement.

19 MR. REILLY: There must be proof.

20 THE COURT: As to the purpose?

21 MR. REILLY: By Mr. Cataldo that these were
22 business-related loans he was paying off.

23 THE COURT: That they were deducted as business
24 loans?
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MR. REILLY: That's right.

THE COURT: All right. Ask yourself a question and I will see if you can get on the track. If not, Mr. Reilly will object, I am sure.

BY MR. CATALDO:

Q Do you have before you Exhibit 2, the deficiency notice that was issued in this case?

A Yes.

Q Please read the same and advise whether the question of interest which Mr. Reilly just brought up is mentioned as a disallowed item?

A No, it is not.

MR. REILLY: Move to strike the answer.

THE COURT: You object to the question?

MR. REILLY: I object to the question.

THE COURT: Objection sustained. Motion to strike is granted.

Will you please go on and come to grips with this thing. If you can testify as to the different persons to whom you paid interest and the purpose--

MR. CATALDO: Well, there were--

THE COURT: Name one of them, will you, to get on earth again. Name one.

MR. CATALDO: The Marine Misland Trust Company

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Cataldo

1 loaned me money throughout the year. They kept renewing
2 my note all the time. I kept paying the interest charges.

3 THE COURT: How much was the note?

4 MR. CATALDO: There are various amounts.

5 THE COURT: What was the total?

6 MR. CATALDO: Something like 27, \$30,000.

7 THE COURT: Can you identify which of these
8 interest payments were to Marine Midland on that note?

9 MR. CATALDO: Yes, sir.

10 THE COURT: Do so from Exhibit 24.

11 MR. CATALDO: That is not material.

12 THE COURT: Overruled. It is material.

13 MR. CATALDO: No. You asked me for the purpose
14 of the loan.

58x 15 THE COURT: No, I didn't. I asked you for the
16 purpose of paying Marine Midland. That is what I am talking
17 about.

18 MR. CATALDO: That's what I am talking about.

19 THE COURT: Talk about it. Go on.

20 MR. CATALDO: All right. I have carried the loan--

21 THE COURT: Wait a minute. I don't care how you
22 carried the loan. Will you please tell me --

23 MR. CATALDO: That's the trouble, Judge.

24 THE COURT: The trouble is you either don't hear
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Cataldo

2 me or heed me. I am not going to listen to your question.
3 I am going to ask you a question. I can't do otherwise.
4 You don't seem to follow any orderly system.

5 I want to know, and you can tell me, which of
6 these interest items were paid to Marine Midland.

7 MR. CATALDO: That's simple. I will run them
8 right down to you, sir.

9 THE COURT: It's not simple to get it from you.
10 Which item?

11 MR. CATALDO: Item 23, 24, 25, 26 and 27 are
12 banking charges and not interest charges for carrying my
13 account in the Marine Midland. They are definitely business
14 expenses because I have --

15 MR. REILLY: They are not contested, your Honor.

16 THE COURT: All right.

17 MR. REILLY: They are not part of interest.

18 THE COURT: All right.

19 MR. CATALDO: He mentioned \$1800. He included in
20 that \$1800 banking charges.

21 MR. REILLY: I did not.

22 THE COURT: He says No. You just mess this
23 whole thing up.

24 MR. CATALDO: I take objection, your Honor.

25 THE COURT: Will you please do as I have

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2 suggested.

3 MR. CATALDO: The first item of interest in the
4 year 1963 was on a loan of \$4,000 --

5 THE COURT: I didn't ask you that. I don't
6 think that is necessary. If Mr. Reilly wants, let him
7 ask it.

8 MR. CATALDO: This is what you asked me to do,
9 identify the loan and explain it.

10 THE COURT: I didn't ask you that. I am trying
11 to get which items were from the Marine Midland. If you
12 want to say on the loan --

13 MR. CATALDO: No. 28 and No. 29. There's
14 \$25.07 and \$122.07.

15 THE COURT: Is this sufficient, Mr. Reilly?

16 MR. REILLY: That's sufficient to identify it.
17 It isn't sufficient to tell us whether it's for a personal
18 expense or business expense. The assumption is that--

19 THE COURT: What he says I think is that he
20 borrowed quite a sizable loan, \$25,000 or something. I
21 don't see any business expense to that.

22 MR. CATALDO: I have to pay --

23 THE COURT: What was the loan for?

24 MR. CATALDO: Thank you.

25 THE COURT: Don't thank me. I am struggling.

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Cataldo

2 MR. CATALDO: I know, but you cut me right off.

3 THE COURT: Yes, because you get off on a
4 tangent.

5 MR. CATALDO: You shouldn't do that. You should
6 let me alone and you'll --

7 THE COURT: I am not going to let you alone.
8 You go off on all sorts of irrelevancies. This is not
9 within the trial. I am going to tell you that if this
10 goes on I am going to increase your contempt fine.

11 MR. CATALDO: I object to your Honor treating
12 me this way. I haven't shown any disrespect to you.

13 THE COURT: You show disrespect for me when you
14 don't proceed as I indicate you should. I am trying hard
15 to keep this thing on a relevant basis. You don't
16 answer the relevant questions.

17 MR. CATALDO: Judge, you must admit you don't
18 know the facts. You must admit that I do know the facts.

19 THE COURT: I don't know that you do. I am not
20 going to talk any more. Sit down, will you. If you have
21 any more facts of what the purpose of these loans were,
22 tell us.

23 MR. CATALDO: I have to --

24 THE COURT: What was the purpose?

25 MR. CATALDO: To meet business expenses. I

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Cataldo

2 have been running a marginal business here.

3 THE COURT: Yes, I can see that.

4 MR. CATALDO: I'm at wit's end at times to pay
5 a \$25 note of issue fee in a Supreme Court --

6 THE COURT: You don't need to tell me that.

7 You say this money was to permit you to run
8 your business?

9 MR. CATALDO: Yes, sir.

10 THE COURT: Why?

11 MR. CATALDO: Absolutely all of it.

12 THE COURT: When was the loan made?

13 MR. CATALDO: It had been on the books the year
14 before and it ran through this year, and when I got a
15 large fee I cleared up the loan.

16 THE COURT: When did you clear it up?

17 MR. CATALDO: This one I cleared up -- for
18 example, Gustavsson. I loaned Gustavsson over \$20,000.

19 THE COURT: You loaned him money, and then you
20 borrowed money to pay him back?

21 MR. CATALDO: That was to run his business. I
22 was trying to make him a real contractor, a good, live,
23 solvent contractor. He failed and I lost my money,
24 not only the loan, but also that \$867 that your Honor has
25 got under consideration.

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2 THE COURT: Anything more about the purpose of
3 this loan, counsellor?

4 MR. CATALDO: Yes. It's been used to keep me
5 solvent enough to pay my office expense, to pay the fees
6 in the litigation. I couldn't afford to leave cases
7 hanging fire just because I don't have \$4 to file a summons
8 in the civil court. I have to keep liquid. This was the
9 way I did it.

10 THE COURT: All right. That is enough, I think.

11 Mr. Reilly.

12 BY MR. REILLY:

13 Q Mr. Cataldo, during 1963 did you have two
14 daughters in a university?

15 A Yes, I did.

16 Q Where were they at that time?

17 A They were in the University of Michigan.

18 Q Both of them at the University of Michigan?

19 A Yes, sir.

20 Q Was one at the University of Florida?

21 A No.

22 Q Were they both boarding at the University of
23 Michigan?

24 A Yes, sir.

25 Q What was the tuition expense that year?

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A I don't remember.

Q Were you paying --

A The expense was around \$2,000 for the two girls.

Q \$2,000 for full board?

A Something like that, \$2,000. It could be \$2,500 or something like that.

Q Is the University of Michigan a private university?

A I don't know -- it's a state university.

Q Were your daughters and yourself residents of the State of Michigan?

A No, we were never residents of the State of Michigan. What has that got to do with this?

THE COURT: Listen, don't quibble with counsel.

MR. CATALDO: I object.

THE COURT: Strike that out. Answer the questions.

Q Were they on scholarship at the University of Michigan?

A No, no. You can go through my checks and you can -- you have been through my checks fourteen times.

THE COURT: Strike that out.

MR. CATALDO: It's been --

THE COURT: Listen, you are not to argue when you

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Cataldo

are speaking as a witness. I wish you would get that through your head.

Q Mr. Cataldo, in your income tax return did you declare a taxable income of \$4,503?

A From my business, yes.

Q Did that also include interest and dividends?

A No, sir.

Q Was your total income then \$4,488.28?

A No, sir. It was more than that, forty-five plus the interest and dividends.

MR. REILLY: Your Honor, we move to disallow this as a business expense. It's quite obvious that Mr. Cataldo had expenses far beyond what his declared income was, and that the logical inference is that he was using a loan to meet those expenditures.

MR. CATALDO: I was not using it.

THE COURT: Will you please wait a minute.

MR. CATALDO: May I go on redirect, please?

THE COURT: On facts, yes. Ask the question so I will know.

MR. CATALDO: Yes, sir.

BY MR. CATALDO::

Q Did the cost of sending the children to the University of Michigan have anything to do with the loan

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Cataldo

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2 at Marine Midland?

3 A Nothing whatsoever. We had enough income to
4 pay for the children and to pay for our own expense at
5 home. We stayed within the limits of our income as well
6 as we could and it was a very difficult job to tell you
7 the truth. When we decided to entertain anybody, we
8 were always very careful not to entertain anybody who
9 wasn't a customer, and we were always very careful to be
10 sure that we had enough money to be able to pay for it.
11 Frequently we couldn't do as much entertaining as we
12 wanted to. We had to stay within our budget. We stayed
13 within our budget. As a matter of fact, if your Honor
14 will take a look at the record of the people whom we
15 entertained, like at the West Side Tennis Club-

16 MR. REILLY: I move to strike all testimony
17 regarding entertainment.

18 THE COURT: Yes, strike it.

19 MR. CATALDO: I have just one more statement.

20 THE COURT: Ask a question if you are going to
21 say any more.

22 BY MR. CATALDO:

23 Q Have you stated everything you want about the
24 way you used your personal income?

25 THE COURT: The answer will be No to that one.

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Cataldo

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2 A No, I have not.

3 Q What else do you wish to add?

4 A That when a person indicated a lack of interest
5 in giving us any business, we didn't see that person any
6 more.

7 THE COURT: I see. You didn't entertain him
8 again?

9 MR. CATALDO: No, sir, that's right. It's very
10 famous in downtown New York that there are--

11 THE COURT: I am not concerned with what is
12 famous in downtown New York.

13 MR. CATALDO: A lot of these claim adjusters
14 just eat your lunch and drink your liquor and don't give
15 you anything. When I found out that --

16 MR. REILLY: I move to strike this.

17 THE COURT: Strike it out about the claim
18 adjusters.

19 What else do you want to add to your answer to
20 this question which was very broad?

21 MR. CATALDO: Well --

22 THE COURT: Facts.

23 MR. CATALDO: I incurred the obligation at
24 the Marine Midland for the purpose of keeping me liquid in
25 my business. The notice of deficiency says it was a business

1 deduction and the burden of proving that this is not so is
2 on the government. They have got the burden of per-
3 suasion and all they have done is ask me a lot of questions
4 that have nothing to do with it.
5

6 THE COURT: Are you through now?

7 MR. CATALDO: Yes, sir, I am through.

8 THE COURT: What do you say, Mr. Reilly, about
9 this one, this loan? Is it business?

10 MR. REILLY: It's a personal expense, your Honor.
11 The plaintiff hasn't come forward and shown any business
12 relation. He hasn't produced any documentation. Even if
13 we accept his testimony about paying off loans for some
14 other client, this is not an ordinary and necessary
15 business expense of a lawyer. Obviously lawyers'
16 expenses are far more limited than that. They relate to
17 paying salaries of secretaries and buying envelopes and
18 that sort of thing.

19 MR. CATALDO: And I had to --

20 THE COURT: Will you keep quiet.

21 MR. REILLY: It isn't an ordinary and business
22 expense to subsidize clients; that is if we accept his
23 testimony. We have no documentation of it.

24 It would appear, your Honor, from his answers
25 to our examination that he did have other expenses that

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2 necessitated loans. We move to disallow as business
3 deduction but to allow --

4 THE COURT: I am going to rule on it now.

5 MR. CATALDO: I want to say that they had the
6 opportunity to go down -- they had the opportunity to
7 ask me to show them when I made those payments on --

8 THE COURT: They don't have to prove anything.

9 MR. CATALDO: It's their burden to prove it.
10 They had the opportunity to do so. They haven't done it.
11 They come here with a bland statement, general statement,
12 and try to say that I'm lying. It's not the proper way --

13 THE COURT: All right. Sit down and stay there
14 a while.

15 Mr. Reilly, is there any obligation on the part
16 of the government here?

17 MR. REILLY: No obligation, your Honor.

18 With reference to the deficiency statement, I
19 point out the fact that where you have a listing of the
20 so-called business deductions, interest is not included
21 amongst them. An examination would show that interest in
22 this deficiency statement was treated as a personal itemized
23 deduction rather than a business deduction.

24 THE COURT: As to this loan from Marine Midland--

25 MR. CATALDO: That statement --

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2 THE COURT: Will you please keep quiet.

3 MR. CATALDO: That statement is a misinterpreta-
4 tion of the deficiency judgment. The interest charges were
5 gone into before Mr Shulman, they were gone into before
6 Mr. Lipton and before Mr. Levine. They knew exactly about
7 these interest charges. The deficiency was made after
8 these people made these audits. Mr. Reilly is not telling
9 the truth.

10 THE COURT: Now. are you through?

11 MR. CATALDO: I'm through on that point. Thank
12 you for permitting me to speak.

13 THE COURT: I rule that this loan is not a
14 business charge, the interest for the same.

15 Mr. Reilly, as we go along you better make a note
16 about these things because I am going to eventually ask you
17 to submit some proposed findings.

18 What else is there, Mr. Reilly? The other loans?

19 MR. REILLY: There are some other loans, yes.

20 THE COURT: From other persons or banks?

21 MR. REILLY: Item 53, your Honor, is the next one,
22 Manufacturers Hanover Trust, \$20, interest.

23 THE COURT: Just a minute. Another bank.

24 Are there other loans from that bank? Do you
25 have any other loans? Mr. Cataldo, --

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Cataldo

MR. CATALDO: I was overdrawn at the Marine Midland. They wouldn't lend me --

THE COURT: What was this interest for?

MR. CATALDO: I went down to the Manufacturers Trust Company downtown here because I had a friend. I had an officer there. I asked him to give me a loan. He did.

THE COURT: How much was the loan?

MR. CATALDO: It was either one or two thousand.

THE COURT: When was this?

MR. CATALDO: In '63.

THE COURT: Mr. Reilly.

BY MR. REILLY:

Q Were you overdrawn at the Manufacturers Hanover or Marine Midland?

A I didn't have an account at Manufacturers Hanover. I was overdrawn at the Marine Midland.

Q Did you use this loan --

A These charges are indicative of the fact--

THE COURT: Answer his questions now. If you don't stop I am simply going to have to increase your contempt situation. I am tired of this.

Q What did you do with the proceeds of the \$2,000 loan from Manufacturers Hanover?

A It was put into my general account and they paid--

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Cataldo

2 the overdraft was paid and I kept the balance, if any, in
3 that account to pay my regular running charges.

4 Q Did you use the regular account in the Marine
5 Midland Bank for your personal expenses?

6 A I only had the one account, yes.

7 MR. REILLY: We have no further questions,
8 your Honor.

9 We move to disallow that expense, business
10 expense, but to allow it as a personal itemized deduction.
11 There is nothing here to connect that particular loan and
12 payment to Manufacturers Hanover to a particular business
13 operation.

14 THE COURT: It's disallowed as a business loan.
15 As personal it is allowed.

16 I take it there are no others from Manufacturers
17 Hanover; is that right?

18 MR. REILLY: No. 56 is Manufacturers Hanover.

19 THE COURT: What's that, \$5.50? Do we have
20 to have a hearing about that? It will cost you more
21 for your record almost.

22 MR. REILLY: It may well be the same loan.

23 THE COURT: Is that the same loan?

24 MR. CATALDO: I don't know which item it is.

25 THE COURT: Number 56, \$5.50, four days later.

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Cataldo

2 If you don't know, who does?

3 MR. CATALDO: That was a charge I got in
4 connection with the loan.

5 THE COURT: With an account? The same loan?

6 MR. CATALDO: Apparently the same loan. I
7 only had the one loan.

8 THE COURT: All right. Same ruling.

9 Any other from that bank? Any other loans,
10 Mr. Reilly?

11 MR. REILLY: There are quite a few, your Honor.

12 May I ask Mr. Cataldo some questions and then I
13 can annotate this later and save us time?

14 BY MR. REILLY:

15 Q Did you have any other loans besides the loan
16 to the Marine Midland and the loan to Manufacturers Hanover?

17 A I don't recall any.

18 Q Periodically throughout 1963 did you make payment
19 on these two loans to Marine Midland and Manufacturers
20 Hanover?

21 A Yes.

22 Q Are those periodic payments listed on your list
23 of claimed expenses here?

24 A Yes, they are listed there.

25 MR. REILLY: Your Honor, in view of that --

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2 MR. CATALDO: I didn't take the principal payments
3 against the loans as a business deduction, as you seem to
4 think, at one time. I called your Honor's attention to
5 that fact.

6 MR. REILLY: I move to strike as irrelevant.

7 MR. CATALDO: It's not irrelevant. It shows
8 your temperament --

9 THE COURT: Strike it all out. You can't control
10 yourself, counsellor.

11 MR. REILLY: The testimony now is there are only
12 two loans.

13 THE COURT: Each one that is set forth is one
14 or the other?

15 MR. REILLY: Yes, according to the testimony.

16 THE COURT: I will make the same ruling on all
17 of them.

18 MR. REILLY: We will in representing our find-
19 ings of facts then be able to draw up a listing of loans.

20 THE COURT: All right.

21 Have we finished the interest payments?

22 MR. REILLY: Yes, your Honor, that takes care
23 of the interest.

24 The last item is sales tax. On Mr. Cataldo's
25 return, which is Exhibit 1, there is a claim in itemized

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Cataldo

2 deductions for \$210 in state and local sales tax. He was
3 allowed by the deficiency notice \$150, not \$210. We
4 stand with that \$150. We do not change the government's
5 position.

6 THE COURT: It's a question of whether he can
7 come forward with something to prove the difference; is
8 that so?

9 MR. REILLY: That is correct, your Honor.

10 THE COURT: Do you have any proof, counsellor,
11 Mr. Cataldo?

12 MR. CATALDO: I don't know how they arrived at
13 \$150.

14 THE COURT: I didn't ask you about that. That
15 is not before me. The question is: What do you do about
16 the balance? Do you have any proof?

17 MR. CATALDO: The balance is unintelligible to
18 me. I don't know what they are doing.

19 THE COURT: Then we will take all of it off.
20 They give you \$150.

21 MR. CATALDO: I don't know whether the 150
22 includes state taxes, city taxes --

23 THE COURT: I will solve it this way.

24 Will you present any proof whatsoever with
25 respect to payment of the sales tax? Do you have any

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Cataldo

2 proof or is it just some rough estimate?

3 MR. CATALDO: The return permits you to estimate
4 it. I estimated it according to the return.

5 If the return says I can do it that way, I did
6 it that way.

7 THE COURT: All right.

8 Is that the end of your statement?

9 MR. CATALDO: I did whatever the return said.

10 THE COURT:: I said is that the end of your
11 statement?

12 MR. CATALDO: I fixed my sales tax in accord-
13 ance --

14 THE COURT: What about that claim, Mr. Reilly?
15 Can they just estimate these things?

16 MR. REILLY: They can't just estimate, your
17 Honor. They have to substantiate it. If, for example,
18 they bought two expensive automobiles, they would be able
19 to compute the tax and they would show the purchase price.
20 Perhaps on day-to-day items at the grocery store and
21 elsewhere, many of which are not taxable, by the way,
22 they can estimate, but they can't estimate at \$210. The
23 government has allowed him \$150. He must come forth and
24 provide evidence.

25 THE COURT: I am going to rule.

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2 MR. CATALDO: I did buy an automobile during
3 that year, didn't I?

4 THE COURT: Don't ask us.

5 MR. CATALDO: I did buy an automobile that year.

6 THE COURT: When did you buy it?

7 MR. CATALDO: That year. I don't know when that
8 year. It wasn't reported as a deductible item either.

9 THE COURT: Do you know what the facts were?

10 MR. CATALDO: No, but I'm entitled to estimate
11 it.

12 THE COURT: I am asking you a question to get
13 your facts out, but you don't appreciate it, you just talk
14 and talk.

15 MR. CATALDO: I don't remember the tax on the
16 automobile.

17 THE COURT: What kind of car was it?

18 MR. CATALDO: Ford.

19 THE COURT: Do you know what model Ford?

20 MR. CATALDO: Yes, it was --

21 THE COURT: What is the rate there, Mr. Reilly,
22 on the car?

23 MR. REILLY: In that year there was no state
24 sales tax. The local city sales tax was three per cent.

25 THE COURT: Do you remember the cost?

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MR. CATALDO: Around \$4300 or \$3800.

THE COURT: Three per cent would be \$120, if that is what it was. State tax or federal sales --

MR. REILLY: These are local sales tax.

THE COURT: That's all there was, wasn't there?

MR. REILLY: Yes, in 1963.

MR. CATALDO: The others are --

THE COURT: Let's be practical here.

What is the balance over the allowance you made?

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MR. REILLY: \$60. Your Honor, when we allowed \$150, it's allowed as a generous concession. There is absolutely no proof here at all.

THE COURT: We are fiddling around about a small amount.

You didn't know about the automobile when you estimated it, did you?

MR. REILLY: There is no proof to this day, your Honor, that he purchased an automobile in 1963. I haven't seen any document to prove it.

THE COURT: He said it.

MR. REILLY: I would like to ask him questions on it.

THE COURT: All right. We are getting down to spending more time on transcripts than the items are

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2 worth sometimes.

3 BY MR. REILLY:

4 Q When did you purchase the automobile in question,
5 Mr. Cataldo?

6 A In 1963.

7 Q When in 1963?

8 A I don't know. I could call up Christianson &
9 Weiss and find out.

10 Q Do you have a bill of sale from Christianson &
11 Weiss?

12 A I don't know whether I still have it. This is
13 ten years ago. We had a Ford in 1963. We had a Ford
14 Galaxy. It was 1963.

15 Q How long did you have that car for?

16 A About five or six years. I ran it for
17 176,000 miles.

18 THE COURT: Nobody asked you that.

19 MR. CATALDO: He asked me how long.

20 THE COURT: How long doesn't mean how many miles,
21 counsellor. You can throw in plenty as you go along.
22 Please don't.

23 MR. REILLY: I have no further questions,
24 your Honor.

25 I have had no information about this automobile

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Cataldo

1 prior to this. We haven't got any date set forth here.
2 I think the evidence is rather paltry. What we have is
3 Mr. Cataldo's word. Memories do dim. This is ten years
4 later. It could have been in 1962.
5

6 MR. CATALDO: It was a '63 Ford.

7 THE COURT: I am going to allow it.

8 What else is there here?

9 MR. REILLY: Are you allowing the full \$210 as
10 local sales tax, your Honor?

11 THE COURT: I am allowing \$60 more in addition
12 to the \$100.

13 MR. REILLY: In addition to the \$150 we have
14 conceded?

15 THE COURT: Yes.

16 MR. REILLY: We take exception to that.

17 THE COURT: All right. If you want to do
18 anything about these cases, where I rule against the
19 government, you will have to submit proposed findings.
20 If you acquiesce in my rulings, then you don't have to
21 submit findings on this.

22 What else is there here that is outside of all
23 of these extra things mentioned by counsel this morning
24 and on which I said I would take a memorandum? Anything
25 else.

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Cataldo

2 MR. REILLY: Nothing else, your Honor.

3 THE COURT: This is my direction, Mr. Cataldo.

4 Will you please listen. If you don't hear me, please speak
5 up.

6 MR. CATALDO: Yes, sir.

7 THE COURT: I direct that on or before Monday
8 next, the 21st --9 MR. CATALDO: Judge, I have this trial I am
10 going into. Please give me more time.11 THE COURT: Two weeks. It must be done posi-
12 tively by that time. That is a holiday. Get the papers
13 in the Friday before that, a week from this Friday, the
14 25th.15 You will state there these various items that
16 you referred to and which you said we hadn't taken up. It
17 will be simply the items, if any, or the claims that you
18 make which you haven't submitted here and which relate to
19 and solely relate to these questions here which have not
20 been heard. You had a whole long list. That's it.21 You may reply. How long do you want after you
22 get the papers?23 MR. REILLY: The following Wednesday would be
24 adequate, your Honor.

25 THE COURT: All right. From the Friday to the

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2 following Wednesday. That's the 30th.

3 All right. Ultimately here, as I see it, I am
4 compelled under Rule 52, I regret to state, to make
5 findings, even though I have determined the outcome. On
6 the other hand, if there are items, Mr. Reilly, which you
7 would acquiesce in, then you would not have to file any
8 findings.

9 To you, Mr. Cataldo, may I say the same thing.
10 If you are acquiescing in any of my rulings which I have
11 made in the course of these hearings the last two days
12 and today, you will not be required to submit proposed
13 findings. Otherwise, you will be required.

14 I shall determine whether or not there's any
15 further hearing after I have received these two briefs.
16 Have I made myself clear, Mr. Reilly?

17 MR. REILLY: Yes, sir, the government under-
18 stands.

19 THE COURT: It must be expeditiously taken care
20 of. I am not going to sit around here in July and work
21 my head off on this case. There is no reason why I should.

22 I return to Mr. Cataldo these two exhibits,
23 24 and 25 for identification.

24 Whether or not you ultimately, either one of
25 you, secure the transcript is up to you individually.
In other words, Mr. Reilly, if you can make your findings

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2 without the transcript, more power to you.

3 Will you please sit down. I am talking.

4 MR. CATALDO: I'm sorry.

5 THE COURT: You are very discourteous. I have
6 to say it.

7 MR. CATALDO: I try not to be.

8 THE COURT: I don't understand a lawyer who gets
9 up and fumbles around with his papers while the Court is
10 telling you something.

11 The same thing with reference to the transcript
12 applies to you. You will have to submit, as I have said,
13 whatever there may be, the findings which contest the rulings
14 made by the Court.

15 Do you understand what you will have to do, Mr.
16 Cataldo? You will have to submit proposed findings of fact--

17 MR. CATALDO: Yes, sir.

18 THE COURT: -- with respect to any item which
19 is not acquiesced in by Mr. Reilly or by yourself.

20 MR. CATALDO: May I ask a question about that?

21 THE COURT: If it's a short one.

22 MR. CATALDO: Are the proposed findings supposed
23 to be exchanged?

24 THE COURT: Yes, of course.

25 MR. CATALDO: Will we have a chance --

1 wt

2 THE COURT: A very short time afterwards.

3 MR. CATALDO: Two days will be enough for me
4 to reply to his findings.

5 THE COURT: However, I have already determined
6 them and I shall have to have a good deal of information
7 or law to change.

8 MR. CATALDO: May I also write a memorandum of
9 law in support of the findings, proposed findings?

10 THE COURT: If you think it's necessary.

11 MR. CATALDO: Thank you.

12 MR. REILLY: Your Honor, I'm somewhat confused.
13 Are there findings of fact due in this case by
14 a certain date?

15 THE COURT: I haven't fixed the date. I might
16 as well fix it. I will have to do it as to any of these
17 findings, any of these matters which are at issue.

18 What was the last date I mentioned? It was the
19 30th of May, wasn't it?

20 MR. REILLY: That's correct.

21 THE COURT: I am going to require plaintiff
22 here, Mr. Reilly, to submit his to you first by the 4th
23 of June. I am going to require plaintiff to submit
24 findings to Mr. Reilly and to the Court.

25 And, Mr. Reilly, you are to submit yours -- is

1 wt

2 the 7th too soon?

3 MR. REILLY: No, your Honor, that's all right.

4 THE COURT: That's it.

5 MR. CATALDO: You said also you would give me
6 two days to reply to his findings.

7 THE COURT: I don't know that that is necessary.
8 You serve yours and he replies to yours.

9 When did I say yours were to come in, Mr. Reilly?

10 MR. REILLY: On the 7th of June.

11 THE COURT: The 7th is on Tuesday. I will give
12 Mr. Cataldo to the 9th.

62x 13 MR. CATALDO: Thank you, sir.

14 THE COURT: There's still \$50 due, Mr. Cataldo.
15 I will enter an order unless there's some other disposition
16 which I can make of this thing. You claim that you didn't
17 have any money.

18 Do you have money in the bank?

19 MR. CATALDO: Not yet. I expect a check --

20 THE COURT: How do you live?

21 MR. CATALDO: That's a good question. I didn't
22 spend a nickel over the weekend excepting for church con-
23 tributions.

24 THE COURT: If you have money you should pay
25 this fine. If you don't have money and you say you are a

1 wt

2 pauper, I might remit it.

3 MR. CATALDO: I don't have money.

4 THE COURT: Do you have any cash anywhere?

5 MR. CATALDO: No, I have no cash, not the kind
6 of cash your Honor is thinking about.

7 THE COURT:: I am not thinking about any kind
8 of cash.

9 MR. CATALDO: The only cash I have is \$4 in my
10 wallet.

11 THE COURT: Do you have something in the bank
12 now?

13 MR. CATALDO: Not yet. I expect to. I am
14 overdrawn at my account. You can call up the Marine Mid-
15 land.

16 I respectfully move your Honor to remit the
17 penalty because, as I told you before --

18 THE COURT: All right. I will decide that after
19 I learn what you submit, what further proceedings there
20 have to be here. You have occupied too much time and
21 too much on the record here.

22 All right, gentlemen.

23 -----
24
25

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Robert Levine (recalled)	6 272			
Anthony B. Cataldo	23	52		
T. Gorman Reilly	312	316		

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
1		9
2		11
3	39	40
4	48	112
5	66	66
6	96	97
7	124	125
8	126	127
9		128
10		129
11, 12		132
13	154	154
14	162	
15	167	
16	176	
16A		178
17	179	179
18	186	186

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
19	187	187
20	199	199
21	205	205
22	206	206
23	209	209
24, 25	224	
26	237	238
27	251	
28	255	
29	268	
30		307
<u>Defendant</u>		
C	308	309
D	316	

I, (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) skill and belief from the stenographic notes of this proceeding.

[Signature]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
:
ANTHONY B. CATALDO and
ADA W. CATALDO :
:
Plaintiffs : 69 Civ. 407
:
-against- :
:
UNITED STATES OF AMERICA :
:
Defendant :
----- x

S I R :

PLEASE TAKE NOTICE that pursuant to the direction of this Honorable Court made from the bench on May 14, 1973 the following is a list of issues that plaintiff intended to offer for the consideration of this court for trial. This list is of matters not before considered by the court during trial and is offered without prejudice to plaintiff's claim of errors committed during trial.

1. Plaintiff prepared a list of admissions by defendant to deductibility of certain expenses, served them upon the other side, and filed it with the court in advance of trial and finally offered them into evidence. Those were marked Ex. 24 id. They should be allowed into evidence. If not then plaintiff should be permitted to offer in evidence the following:

(a) from the deposition of Mr. Levine the components of the deficiency notice which was the first claim of disallowances.

(b) the disallowances claimed by defense counsel enclosed with his letter of March 12, 1973.

(c) the disallowances claimed by defense counsel enclosed with his letter of March 16, 1973.

(d) the disallowances claimed by defense counsel volunteered with his letter of April 5, 1973.

(e) defense counsel's letters of April 16 and 17, 1973 copies of which were filed with this court.

By subtracting only those disallowances which have never been waived from deductions claimed in the return this court would have limited the issues and it would have had a clear picture of the admitted expenses. Also, when defendant, as it did, departed from the deficiency notice to claim disallowances contrary either to the deficiency notice or to prior admissions by counsel, then the burden of proof on those items would be placed upon the defendant. Instead, the list, ^{Ex.} 24 for id, was never considered by this court, the offer to put it into evidence has been deferred, the defendant has been allowed to claim new disallowances as if it could make up a deficiency on the spot whenever the spirit moved defense counsel, and what is worse, this court has dealt with them as though the burden was upon

the plaintiff to prove them wrong.

2. Plaintiff offers to prove that the notice of deficiency was incorrect and an arbitrary assessment of the tax followed. The facts are:

a. Contributions of more than \$300. paid by check to named charities were disallowed.

b. All cash contributions to named charities were disallowed although the evidence was uncontradicted that taxpayers made cash contributions as well as contributions by check.

c. That a sum of \$1,084.57 was disallowed from a total of \$2,699.82 for services paid by the taxpayers but when asked to specify what items made up the \$1,084.57 during the pre-trial deposition, the auditor Mr. Levine, named 6 items for a total of \$171.09 viz; two auto expenses to Hertz for \$21.75 and \$18.13; New York Law Journal \$48; East Hills Electric Service \$6.75; John Thomasina \$36.46 and building service employees for \$40. This left \$930.48 unexplained. On this trial the defendant conceded the first three items and the court allowed the \$40. item.

d. The deficiency letter disallows \$2282.58 under case disbursements. Yet on the same deposition, the defendant was asked to state components of the items that made up that total, but it could not. It turned out to be a deduction by the Appellate conferee made to find a dis-

allowance without it having reference to any specific deduction claimed. Mr. Levine testifying in the deposition could not and did not specify any items of claimed expenses that was supposed to have been included in said disallowances of \$2282.58. See pages 92 et seq., and especially at p. 96 where the witness was asked and he answered beginning with line 17:

"Q. What is the \$2200. item made up of?

A. I can't tell you what it is made up of
I can't tell.

Q. Is there any record, either in your own or Mr. Lipton's notes of what the \$2200. consists of?

A. Not readily ascertainable."

Yet, the proof on the trial was that the books and records of the taxpayer had been given over to defendant on three occasions before the deficiency notice. Plaintiff also wishes to state to the court that he had offered to the Appellate Conferee to employ an accountant to restate the return. Mr. Lipton accepted. Such a summary was made and both Mr. Lipton and Mr. Levine used that summary to check out the claimed expenses. The point is that the foregoing shows that the deficiency notice was inaccurate and arbitrary and it stated substantial disallowances which were arbitrarily arrived at because they had no relation to any expenses claimed by taxpayer.

3. Plaintiff also wanted to call the court's attention to the rule that a taxpayer is not required to substantiate items of expenses of less than \$25. see Regulation 1.2745-5 (c) (2) (c) (iii). This concerns the sum of \$2232. already allowed by the defendant from the items listed in the diary. Also it concerns the expenses at the Bankers Club and the other clubs. All Bankers Club expense items were for less than \$25. Taxpayer testified that all Banker's Club items were for business persons. Besides the expenses at the Bankers Club were incurred in a business setting and as such they need no substantiation, the business character of a luncheon club being considered substantiation enough see Reg. 1-274-5 (c) (2) (b). Plaintiff wants to point out all items spent which were of less than \$25. Many of these items were lumped together for billing purposes and the grouped expenditures were paid by a single check of more than \$25. In those cases plaintiff wishes to place before the court the actual costs of the separate items and the total billed and paid for. The same regulation states that a restaurant or club bill for the charge made is sufficient substantiation for the item.

4. Secondary Evidence. Plaintiff believed himself

entitled to prove substantiation of most of the items of entertainment expenses and of the diary expenses which were for more than ⁵25 each by secondary evidence. Regulation 1.274-(5) (c) (5) permits the use of secondary evidence to substantiate the claim of the plaintiff to the entertainment expense claimed and even to some of the other items of expense claimed. Reconstruction of the items would be possible under the regulation. Plaintiff had had a record of original entry, his diary. That contained not only his day to day activities on cases of clients, and it was used as a time sheet for cases worked on during the day, but also it contained a notation of items expended during the day in the operation of the law office, and included, were the names of parties entertained, if any, whether at a restaurant, at the Bankers, or West Side or Atlantic Beach Clubs. Plaintiff testified that that diary is lost through no fault of his; that he has made diligent search for it, but he was unable to find it; the last time he saw it was when he submitted his records to defense attorney but withdrew the diary until defendant obtained a court order permitting him to inspect it, since the diary contained entries concerning client's affairs. Plaintiff wanted to testify because he had separated the diary from the rest of the records in this case when he turned over to defense

counsel the records in this case, that he had returned it to where all other diaries of past years were kept viz; the bottom drawer of his desk; that in the month of June 1972, plaintiff caused his office furniture, files and records to be removed from 12 John Street to 111 Broadway; that he himself had suffered a stroke and had entered Lenox Hill Hospital on June 17, 1972 where he stayed for testing and observations until June 23, 1972 and then he stayed at home convalescing and unable to go to the office until July 5, 1972; that in the meantime, the moving from 12 John Street to 111 Broadway was handled by the movers on instructions from plaintiff given them over the telephone. Upon plaintiff's return to the office, he found many things missing such as the contents of the bottom drawer of his desk which besides old diaries also included old checkbook stubs and paid checks and bank book statements.

5. Plaintiff, for this trial, served a subpoena upon Mr. Levine which called for the production of his department's records. Attached hereto is the original of such subpoena which is offered into evidence. Deponent put Mr. Levine on the stand ~~and~~ asked for the production of the records. On his deposition, Mr. Levine ^{had} ~~and~~ stated that he had made notes of his examination of plaintiff's

books and records; that Mr. Lipton had made notes of the same book and records, and that Mr. Shulman also made a record of the evidence submitted by plaintiff to him. Mr. Shulman had taken a ^{copy} ~~top~~ record of the expenses recorded in the diary, the diary having been left with him. The plaintiff wanted to offer these records into evidence but the court would not allow plaintiff even to question the witness about the nature of the records he sought. The record should show that plaintiff sought to question the witness but he was directed not to pursue that line any more. Not even an offer of proof was permitted by the Court. This action is contrary to FRCP 43 (c). Also, the regulations allows secondary evidence and so does the evidentiary rules of the District Court allow secondary evidence. The court stated several times that the government does not have to prove plaintiff's case. That was not the thrust of plaintiff's action. Plaintiff was proving his own case. The evidence was in the possession of the defendant, a subpoena had been served, and plaintiff was entitled to have the evidence produced. The governments records may be put into evidence by statute. See 28 U.S.C. A. 1733. Defense counsel has resisted the production of these records on improper grounds. Plaintiff has sought the government's agent's notes of the records once in this possession. Also, plaintiff sought admission, if any made,

by these agents, about the deductibility of the items they had examined. Plaintiff has never requested interdepartmental memoranda dealing exclusively with a government function.

The government in a tax refund suit stands in no different situation than another litigant. Its admissions where relevant may be proof in favor of the opponent. Hence, plaintiff respectfully requests permission to add to the record the notes of Messrs. Shulman, Lipton and Levine of the evidence submitted to them by plaintiff, and the record of their recommendations as to deductibility or not of the expenses claimed by plaintiff. Attached hereto is a list of the pages in Mr. Levine's deposition where he talks of the records made of the examinations of plaintiff's books and records by Mr. Shulman, Mr. Lipton and himself.

6. Plaintiff also offers to state the facts of how he operated his law office and what expenses he generally incurred in the ordinary course of that operation. He wanted to show how it was necessary for him to seek prospective clients; how his practice began, what his prospect for business was then, how he widened those prospects by the judicious and careful screening of prospects, how a definite determined program was created, and what it involved and how it was carried on; and to show the results, busi-

ness-wise, of such a program. Plaintiff did state that if a prospect showed that he would not give plaintiff any business he would be dropped, but now he wanted to cite some examples. Vogel, Wise, Nunez, Smith, Kern, Wolf and Monroe are the names of people who once were catered to but have been dropped. The point is that a definite program was adopted and carried out and as the choice of such a program under the law, is a subjective act of the taxpayer, plaintiff was anxious to put all these elements into the record. Yet, this court adopted a method of procedure which defeated plaintiff's purposes, forced him to try the case without that background and when plaintiff did remonstrate and insist that he was entitled to state the facts of how he went about entertaining clients generally, he could only give a limited account of the specific expenses evidenced by the payments at the West Side Club. Actually, the programming of such activity and the necessity of it in plaintiff's peculiar circumstances of engaging in the practice of law was never expressed. Plaintiff believed it necessary to do so in support of his claimed expense and so he sought to place the proof before the court but he was, instead, instructed to write out his offer of proof which this is.

7. Plaintiff also wanted to show the bank charges he had incurred for paying checks because he had no ^{MONEY} in his

account. This was necessary not so much as to show the cost but as to show the hand to mouth operation that plaintiff was running. That would support the inference that he was careful in committing himself to expenses and that the expenses he did commit himself to were absolutely necessary in his opinion, to the advancement of his business as a lawyer. The fact that entertaining clients would be a tax deduction played a major role in deciding to spend that money. The fact is that in total the expenses spent and claimed are not lavish but are moderate. They, however, took up a part of the gross income but only such part as plaintiff thought necessary for business. The scarcity of cash as reflected by the bank charges paid through ^{the} year supported by the bank statement showing small or no balances between deposits of fees would be proof of both the necessity of doing what plaintiff did and that it was ordinary in his business to carry on his business in that manner. This would also make plaintiff's decision to operate in that manner credible.

8. Plaintiff also intended to argue the necessity of the proof mentioned above by showing that Mr. Madden had put before the court the list of disallowances found in defendant's trial memorandum which the court followed and insisted on plaintiff following without any proof of the background in which those items of expenses were incurred.

Then when plaintiff explained some of the facts in support, the court would allow defense counsel to cross-examine but before any redirect was offered, the court would disallow the item. Plaintiff found himself nonplussed, but he would try to explain the non-applicability of the cross-examination at which the court would direct plaintiff to cease and desist upon penalty of contempt. Why the court adopted such a procedure is not for PLAINTIFF to reason, but IT deprived plaintiff of a fair opportunity to explain the facts fully. Yet, there was a more complete exposition of the disallowances before the court that had been prepared by plaintiff. This was PL. ex. 24 for id. This list was more efficacious for the court's use as it also contained admissions by the defendant of deductibility of some of the items. As it was, there were more disallowances claimed by the brief than shown on Ex. 24 for id. but without explanations for the new disallowances claimed. This made for a harsh judicial task operating to the disadvantage of the plaintiff. Furthermore, Mr. Madden entered the judicial process to an unfair extent. He would decide the disallowances and the court would follow. He would disclose his decision in a short conference with the court. OR he would signal a disallowance by a sliding motion of his hands in opposite direction after which the court would disallow the item. Here, then, were items of expense in-

curred by a lawyer who had carried on the practice of his profession for 40 years being told that he could not claim an ordinary expense by one who has probably never practiced law. Consequently, the court was not really deciding the matter from his own experiences. Plaintiff wanted to make known his objection to this procedure.

In justification of these remarks, a report of an incident plaintiff had had with Mr. Madden might be relevant. In the late afternoon of Friday, May 4, 1973, after plaintiff had returned from Supreme Court, Nassau County, where a jury had been picked in Campbell v. Metal Fabricating Company and where plaintiff was the attorney for Campbell and that jury had been disbanded on motion of one of the defendants and a new jury was to be picked Monday, May 7, 1973, this plaintiff telephoned Mr. Madden to tell him of these events and of plaintiff's engagement. Mr. Madden cut short all explanations and said that plaintiff had better be before Judge Levett on Monday May 7, 1973 at Room 1102 or this case will be dismissed and a record made to insure that the default could not be opened. Plaintiff had no alternative than to make up an affidavit of prior engagement and have it taken to the call of the calendar by Judge Levett on May 7, 1973. Attached hereto is a true copy of that affidavit of engagement which is offered into evidence. The point is that when this case was set for

trial for May 7, 1973, Judge Levet was told of the Campbell case and of yet another case, that was before Judge Bonsal, and he should have accepted the engagement gracefully. The hostility to plaintiff's problem by Mr. Madden was unwarranted and incomprehensible. Of what use is it to a litigant to try his case before such hostile judicial officers?

9. Also, plaintiff intended to read into the record from Mr. Levine's deposition at p. 111, line 12 etc., the following:

"by Mr. Reilly***

Q. Did Mr. Cataldo show you a lawyer's diary for the year 1963 in connection with certain business expenses?

A. Yes.

Q. Were you allowed to retain that ?

A. No, sir.

Q. Was that taken back from you?

A. It was never--it was part of his books and records, not intended to be taken by me, although I did extract tapes of the total diary expenses indicated."

Also at p. 111, line 25, further questions were asked by Mr. Reilly of Mr. Levine as follows:

Q. Did you have an opportunity to review the statement of expenses submitted by Mr. Cataldo together with his tax return?

* * *
A. Yes, sir.

* * *

Then starting at p. 112, line 25, the following appeared:

"Q. You mentioned that you did examine the work sheets submitted by Mr. Cataldo with his return; how many pages of the work sheets were there?

A. I think 18 pages."

9. Plaintiff also wanted to question Mr. Levine or get a concession from defense counsel that in 1963 there was a directive from the commissioner relating to treating leniently with the requirement of records for that year. Such instructions may not have been published publically but were additional to the Cumulative Bulletins that are mentioned in plaintiff's trial memorandum. If there was such a directive, then, certainly, the \$500 item paid in January 1963 for an expense incurred in December 1962 was sufficiently proven by showing the bill of the West Side Tennis Club bill with the break down on a note attached to it and the check in payment. Also such records

as plaintiff had, of the later expenditures in 1963, such as checks and bills could be supplemented from defendant's records by the agents' abstracts of plaintiff's records. These would have been sufficient to support the claimed expense. Restraint regard^{ing} records in 1963 was being exercised. Why wasn't it done in this case?

The foregoing completes the matters which plaintiff intended to take up with the court on November 14, 1973. Since then, plaintiff has^{PAID} the sum of \$50. which he had moved to be remitted but the court proceeded to enter an order for contempt without passing on the motion to remit. Such action is evidence of a firmly grounded bias against plaintiff's case. This court held plaintiff for contempt without just cause. There was no intention to be disputatious with the court and the record will reflect that. All plaintiff did was to try to make a record for review. He was prevented from making a full record despite the several occasions when the court invited plaintiff to speak as fully as he wished on a stated subject. By the same token, he could not speak as fully on a different subject and if he attempted to do so, he would be charged or threatened with contempt again. Besides, there were many decisions made up to the time that the court made its first invitation to plaintiff to state his proof on a particular point. Plaintiff is not given to fault finding but he has tried

cases and is aware that a restrictive direction from the court will prevent a full and fair prosecution of a case and that that is what has happened in this case.

Plaintiff is even now fearful that if the court will hold further hearings and take up the items here discussed that instead of a calm event taking place when plaintiff might express his thoughts, he will ^{be} subjected to the same kind of interruptions and harangues about his alleged incompetencies or charges of mafia-like conduct such as have been made by this court several times, and finally no matter what he shall say, it will be the subject of dismissal on ~~that~~ ^{the} generality that he failed to persuade the triers of the truth of the fact. It is respectfully suggested that this court either accept this memorandum of facts as the testimony that plaintiff would give and that the defendant cross-examine if it desires, and if he does, that plaintiff be given an opportunity to put in such re-direct as he may deem necessary. Or, the court might order a mistrial altogether and refer this case to the calendar clerk for reassignment to another judge with the right to a trial by jury restored. Plaintiff does not wish to be held for contempt again. He cannot afford the fine. Nevertheless, the portents of this case is such that no matter what he does, he will be held in contempt. There was an attorney in the case ahead of this one at the

start of this case, who was held in contempt and made to pay a \$75. fine. It is not a good thing that a lawyer has to pay for the privilege of trying a case for a client and then be branded contemptuous for trying to do his duty. Justice is not as hard as that. Besides as stated above that lawyer cannot do his duty well for fear of displeasing the court again.

All of the foregoing is an honest endeavor to present this case in good faith and as best as the undersigned can. It is not intended as an arbitrary attack upon the court. What has been written is done in the interest of substantial justice and in the honest belief that the events described truly and factually occurred as hereinabove stated and that such events are material and necessary to a fair consideration of the plaintiff's case.

Dated: May 29, 1973

Yours, etc.,
Anthony B. Cataldo
ANTHONY B. CATALDO
Attorney pro se and for
plaintiff ADA W. CATALDO
Office & P.O. Address
111 Broadway
New York, N.Y. 10006
Tel. No. 962-0965

TO: HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
United States Courthouse
Foley Square
New York, N.Y. 10006

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By *R. Harrison*
Deputy Clerk

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ap

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
JUNE 13, 1973
S.D. OF N.Y.

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

69 Civil 407

-against-

MEMORANDUM

UNITED STATES OF AMERICA,

Defendant.

LEVET, D. J.

At the completion of the trial of the above-entitled action the court granted leave to plaintiffs to submit papers in support of their motion to amend their complaint to include items plaintiffs contended were not covered at trial.

After a careful review of the motion papers of plaintiffs and the opposing papers of the United States this court has concluded that no new matter is being offered and that plaintiffs' motion to amend the complaint is denied and the trial is not to be reopened.

The court is in accord with the position of the United States that plaintiffs' contentions are "nothing more than a recital of arguments which have already been made on the record." (P. 2, Brief of United States.) However, I shall attempt to deal with each item which plaintiffs' allege in support of the motion to amend the complaint and reopen the trial.

Exhibit C

JUNE 13, 1973

This proposed exhibit is merely an abstract of what plaintiffs contend the United States has at one time or another conceded as allowable deductions. The admissibility of this exhibit was thoroughly considered at trial and deemed to be irrelevant.

EXHIBITS A and B

Plaintiffs contend that Exhibit A alone represents claimed business deductions. This is inaccurate. Both Exhibit A and B, taken together, show which claimed deductions are not contested by the United States.

NOTICE OF DEFICIENCY

Plaintiffs seek "to prove that the notice of deficiency was incorrect and an arbitrary assessment of tax followed." (P. 3, Plaintiffs' Memorandum.)

This offer was considered at trial and objection sustained as irrelevant. At trial plaintiffs were given ample opportunity to show what business deductions plaintiff Anthony B. Cataldo was entitled to. At trial plaintiffs produced no evidence that an "erroneous ruling was made at any administrative level."

Plaintiffs present contentions are argumentative and have no probative value.

EXPENSES LESS THAN \$25

It is plaintiffs' contention that a taxpayer is not required to substantiate items of expense less than \$25. IRS Regulations § 1.274-5(c)(2)(i), (ii) regarding entertainment items less than \$25 provides that the taxpayer is required to keep, at the least, a diary record setting forth the date, place and amount of the entertainment, the client entertained and the business at issue. Plaintiffs have offered no evidence of entertainment expenses except plaintiff Anthony E. Cataldo's vague recollection of expenses. In any event, this issue was thoroughly considered at trial.

DIARY

Plaintiffs seek to offer evidence concerning the disappearance of an office diary supposedly maintained in the ordinary course of business by Anthony B. Cataldo. This issue was thoroughly considered at trial and the evidence sought was deemed inadmissible.

I.R.S. AUDITING RECORDS

Plaintiffs seek to have the auditing records of the IRS put into evidence to show that the claimed deductions were valid

business expenses. This tactic is without merit. Plaintiffs have the burden in the first instance to prove their case concerning actual expenses when incurred. Notations and scribbles of various Internal Revenue Service employees have no probative value. This issue was likewise determined at trial.

TAXPAYER'S INTENT

Plaintiffs seek to offer testimony concerning the attitude or state of mind that the lawyer-taxpayer had regarding the conduct of his business. This subjective testimony of the taxpayer was determined at trial to be without merit. The standard to be applied is an objective one. See *Cataldo v. Commissioner*, Slip Op. 72-1595 (2d Cir. March 27, 1973.)

INTEREST PAYMENTS

At trial, interest payments on loans were disallowed as business deductions. However, the court did not preclude deductions for appropriate reasons. Plaintiffs offer no rationale for a contrary determination or for the introduction of additional proof.

TRIAL PROCEDURE

Plaintiffs complain about the conduct of the trial. This argument is without merit. It is elementary that it is for the court to determine the most judicious and efficient conduct of the trial.

TESTIMONY OF AGENT LEVINE

Plaintiffs seek to introduce certain testimony of agent Levine. At trial it was determined that this was irrelevant. Levine was present at trial and plaintiffs had the opportunity to question him on relevant and material matters. In fact, at trial plaintiffs questioned agent Levine about directives from the Commissioner with respect to a lenient application of the Entertainment Rules during 1963. This court sees no merit in allowing further proof on this issue.

In short, plaintiffs have failed to demonstrate any reason for the court to take additional evidence.

Consequently, plaintiffs' motion to amend their complaint is denied and plaintiffs' motion to introduce additional evidence is also denied.

So ordered.

Dated: New York, N.Y.
June 13, 1973.

A 430
(SGD) RICHARD H. LEVET
United States District Judge

2/22/77
agm

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By *R. Harrison*
Deputy Clerk

Per
6/25/73
RH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs,

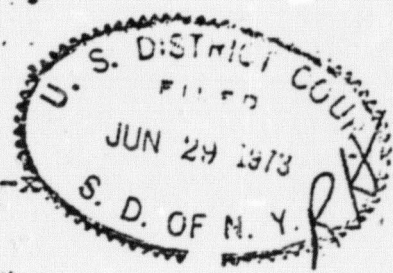
-against-

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT

69 Civ. 407



(59)

Exhibit D

ANTHONY B. CATALDO
~~XXXXXXXXXXXX~~
NEW YORK S. N. Y.
111 Broadway

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs, :

ADDITIONAL OFFERS
OF PROOF

-against-

69 Civ. 407

UNITED STATES OF AMERICA,

Defendant. :

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ANTHONY B. CATALDO, being duly sworn, deposes and says, that he makes this affidavit to supplement his offer of proof dated May 29, 1973 of matters he has been wanting to put before this court. The following developed since May 29, 1973. He has found and desires to offer into evidence a list of handwritten instructions by IRS agent Robert Levine to plaintiff detailing what additional records he wanted taxpayer to have available for him on his next visit to the office of the taxpayer. Included in said list are taxpayer's copies of his 1964 and 1965 returns. On the occasion of the visit that followed, deponent did exhibit to Agent Levine his copies of said returns of 1964 and 1965, and in addition thereto he submitted his work papers from which said returns were made. The work papers for the 1964

return showed the receipt by the taxpayer in March of that year of the sum of \$156.85 received from Mrs. Lewis in payment of the service charges of \$50. and for reimbursement of \$106.85 in connection with the eviction notice that the daughter Valerie Lewis had received. Deponent had been retained on December 18, 1963 to avoid the eviction of said Valerie Lewis which was said to be imminent. Deponent telephoned Landlord & Tenant Clerk's Office and found that a judgment of eviction had been signed but the warrant would not be signed until the next day; that the actual arrears and judgment were \$100. and that if the \$100. were paid that day the warrant would not issue. Deponent telephoned Mr. Lewis, gave him the status as so found and agreed to run out to the Civil Court in Queens that day to pay the \$100. in cash to stay the warrant. Deponent issued his check of \$100. dated December 18, 1964, cashed it, went to the Clerk's office and paid the \$100. over to the clerk. He billed Mr. Lewis for his services of \$50. and expenses incurred of \$106.85. He received a check in payment for \$106.85 and he reported the whole amount of \$156.85 as income in 1964. This system of taking all disbursements for clients as business deductions and reporting the gross receipt as income was being used and is still being used by deponent.

It has been approved by the IRS in the other years examined.

The agent Mr. Levine, who was in court, did not contradict the fact that he had examined the 1964 return; or that the \$100. deduction was included in that year's return. This item of \$100. was one of those items that were not disallowed by the deficiency notice but was included in the trial memorandum as a disallowance. Deponent was caught without an examination of his files on this item, just as he was caught on all the others of the newly claimed disallowances. He, later, found the note of Mr. Levine which corroborates the examination of this 1964 return. A photocopy is attached hereto as Exhibit A to this affidavit to make it a part of the proof. Agent Levine did check the item of \$156.85 in the 1964 return and the item of \$100. spent in 1963 was allowed as a business deduction by the letter of deficiency. Had Mr. Levine's records been produced, as subpoenaed, this item could have appeared therein as an allowed business expense.

Also, by this affidavit, deponent wishes to state that all facts stated in his post-trial memorandum are true and all inferences that plaintiff wishes to have this court draw are legitimate and logical inferences flowing from the solid facts of the case. This step is taken because the

court has before it a request to adduce additional evidence. The request was initiated by the court. Actually, the trial is still open and there is still an opportunity to adduce facts. Plaintiff did not have a fair and full opportunity to present the facts of this case in a manner he thought appropriate to make the pertinent facts on the issues before the court, known to the court. Instead, he was directed under threat of being held for contempt of court to proceed in a manner which disorganized and made it impossible to place the pertinent facts of the case before the court.

Because of the general debilitating effect of the court's action upon the plaintiff, some of the facts of the case, not many, are claimed in the post-trial memorandum. It is hoped that this court will notice them. This court is again requested to hold another hearing at which such facts will be testified to by plaintiff and defendant may have its right to cross-examine or adduce any facts relating thereto as it wishes.

Accordingly, plaintiff does herewith adopt all the facts stated in said post-trial memorandum and states that they are true.

Sworn to before me this
21 day of June, 1973.

Anthony B. Cataldo
ANTHONY B. CATALDO

Ada W. Cataldo
ADA W. CATALDO
Notary Public, State of New York
No. 41-3653150
Qualified in Queens County
Exp. Date with N.Y. Ct. Clerk
Term Expires March 30, 1974

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By *Ada W. Cataldo*
Deputy Clerk

2/23/77 *agm*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

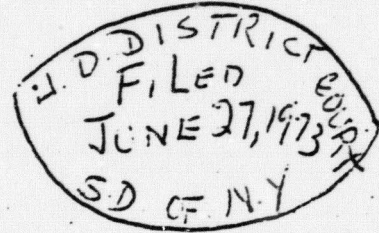
-----x
ANTHONY B. CATALDO & ADA W. CATALDO

Plaintiffs,

against

UNITED STATES OF AMERICA,

Defendant.
-----x



69 Civ. 407

Memorandum

LEVET, D.J.

Plaintiffs, pursuant to an affidavit received
June 25, 1973, seek to reopen the trial to introduce
alleged evidence concerning handwritten notes by
Internal Revenue Agent Robert Levine.

The admissibility of such evidence was considered
at trial and deemed irrelevant. This court maintains
such ruling.

Plaintiffs' motion is denied.

So Ordered.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By M. Karban
Deputy Clerk

Exhibit E

Dated: June 26/73
New York, New York

William H. Lusk
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and ADA W. CATALDO,
Plaintiffs,

-against-

UNITED STATES OF AMERICA,
Defendant.

69 Civil 407

OPINION, FINDINGS OF
FACT and CONCLUSIONS
OF LAW.

APPEARANCES:

Anthony B. Cataldo
Attorney Pro Se and for plaintiff Ada W. Cataldo
111 Broadway
New York, N.Y.

Paul J. Curran, United States Attorney,
Southern District of New York
Attorney for Defendant
T. Gorman Reilly,
David P. Land,
Assistant United States Attorneys,
Of Counsel.

LEVET, D. J.

This is an income tax refund case which was brought by
Anthony B. Cataldo and Ada W. Cataldo as plaintiffs against the United
States of America. The taxpayers, Anthony B. Cataldo and his wife,
Ada W. Cataldo, reside in Forest Hills, New York. Mr. Cataldo is an
attorney. The taxpayers filed a joint income tax return for the year
1963 with the Manhattan District Office of the Internal Revenue

Exhibit F

4361

4396 45

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S.D. OF N.Y.

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JUN 2 1973

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Service, declaring and paying a tax of \$286.54. An audit of this return resulted in a deficiency of assessment of \$2,210.87 being issued by letter dated September 22, 1967. The taxpayers subsequently paid this tax deficiency as assessed plus interest of \$507.62 and submitted a claim for refund of the total amount of \$2,718.49. This claim for refund was never favorably acted upon. On January 21, 1969 the taxpayers commenced this refund suit in the Federal District Court pursuant to 28 USC § 1346(a)(1). On September 2, 1969 the United States filed an answer, denying the taxpayers' right to any refund. Extensive pretrial discovery has transpired, including a deposition of the lawyer taxpayer Anthony B. Cataldo and a deposition of Revenue Agent Robert Levine, certain interrogatories have been served and notices to admit. Plaintiffs' motion for summary judgment was denied by Judge Weinfeld of this court by endorsement dated January 15, 1972.

(1) In its answer the government alleged as an affirmative defense that this court lacks subject matter jurisdiction by virtue of plaintiffs' failure to file a timely claim for refund. Since the filing of the answer, the government has located the original of the taxpayers' claim for refund and has withdrawn its jurisdictional defense to this refund action.

No unusual questions of law are involved. The taxpayers have the burden of proving that they are entitled to various claimed deductions as having been incurred as "ordinary and necessary expenses" in carrying on the lawyer-taxpayer's profession. In the second place, the taxpayers must demonstrate that they are entitled to deductions for certain charitable contributions under Section 170 of the Code, medical expenses and state and local sales taxes.

On their return the taxpayers reported the receipt of \$29,758.58 income received from the conduct of the lawyer-taxpayer's profession. The United States does not contest this total figure of professional income. However, the government has contested the amount of Schedule C deductions claimed by the taxpayers, which amounted to \$25,251.75. It appears that a substantial portion of these items has not been proved by ordinary and necessary business expenses but, in fact, were personal in nature..

TRIAL PROCEEDINGS

The lawyer-taxpayer appeared as attorney for his wife, Ada W. Cataldo, and for himself; no outside counsel was employed. The court attempted to conduct a trial based upon questions asked by Mr. Cataldo and answered by him. However, difficulties arose. Although

the court frequently attempted to limit the questions and the answers to relevant matters, there was a constant failure of the lawyer-taxpayer, as his own trial counsel, to heed the court's instructions. By reason thereof, the court adopted the method of asking the lawyer-taxpayer basic questions and listening to his direct answers to the questions, then giving him an opportunity to add whatever other factual statements he might see fit; Mr. Cataldo acquiesced to this procedure. The trial was further complicated by the repeated efforts of Mr. Cataldo to make repetitious statements of fact and repetitious arguments.

There were approximately 141 items to be considered as to whether or not the proof substantiated the deductions and demonstrated that the deductions in question were valid business expenditures. By reason of the large number of these items, the court, as the trial proceeded, after hearing the testimony on each item, determined whether or not plaintiffs had sustained their burden of proving the propriety of the deductions and stated that result on the record. No transcript has yet been prepared.

At the close of the trial counsel made a certain motion to amend his complaint, to bring in certain items which he alleged had not been heard in the course of the trial. After taking memoranda on this motion from both plaintiffs and the United States, this motion

was denied and an opinion thereon filed June 13, 1973.

The court also accepted a memorandum from plaintiffs with respect to their contentions that the United States failed to make a timely assessment for the taxpayers in question. The court determined that the assessment was timely. (See memorandum filed June 12, 1973.)

Subsequent to trial the court received proposed Findings of Fact and Conclusions of Law from plaintiffs and from defendant, United States of America. The United States has acquiesced in all of the rulings made by the court at the time of trial. These have been fully reviewed by the court since trial.

After hearing the testimony of the parties, examining the exhibits and the proposed Findings of Fact and Conclusions of Law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This court has jurisdiction over the subject matter and the parties to this action pursuant to 28 USC § 1346(a)(1).

2. Anthony B. Cataldo and his wife Ada W. Cataldo ("the taxpayers") resided in 1963 at 1 Ascan Avenue, Forest Hills, New

York. Anthony B. Cataldo is an attorney who in 1963 maintained offices for the practice of law at 1 Cedar Street, New York, N.Y.

3. On April 15, 1964 the taxpayers filed a joint income tax return for the year 1963 with the Director, Manhattan District, of the Internal Revenue Service. The taxpayers' 1963 return was subsequently audited by the Manhattan District Office and at the taxpayers' request was reviewed by the North Atlantic Region Appellate Branch Office. By letter dated September 22, 1967 the Commissioner of Internal Revenue ("the Commissioner") gave notice to the taxpayers of a deficiency of \$2,210.87.

4. Pursuant to statute, 26 USC § 6213(a), the taxpayers were given 90 days from the date of the notice to petition the Tax Court of the United States for a redetermination of the deficiency. The taxpayers did not petition the Tax Court and on January 25, 1968 a deficiency of \$2,210.87, plus interest, was assessed by the Commissioner pursuant to 26 USC § 6201(a).

5. On February 12, 1968 the taxpayers paid in full the assessment, plus interest of \$507.62, in the total amount of \$2,718.49.

6. On June 5, 1968 the taxpayers filed with the Commissioner a timely request for refund of the full amount of the deficiency assessment. No favorable action has been taken by the Commissioner

with respect to the taxpayers' claim for refund.

7. On January 31, 1969 the taxpayers timely commenced this action for refund in the District Court pursuant to 28 USC § 1346(a)(1). The lawyer-taxpayer received \$29,750.58 in income from the operations of his law office in 1963. In addition, the taxpayers received dividend income of \$922 and interest income of \$62.45. The taxpayers incurred a loss from the sale of capital assets in the amount of \$4,918.13.

8. The lawyer-taxpayer incurred the following ordinary and necessary business expenses in the conduct of his law practice, none of which has been contested by the government:

	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
1	Jan 1	Adelphi Judicial Service	\$ 5.00	Process Server
2	"	New York Telephone Co.	16.56	1/2 of house phone
3	" -	New York County Law Assn.	35.00	Dues
4	"	Lawyers & Merchants Trans- lation	6.00	Translations
5	" 4	New York Telephone Co.	4.13	Office Telephone
6	"	Hudson Advertising Co.	145.50	Publishing of Process
7	"	Dept. of Motor Vehicles	6.00	Reports
8	" 11	Dorothy Altman	8.00	Steno. services
9	"	American Judicial Soc.	10.00	Dues
10	" 17	Commerce Photoprint	1.24	Copying Services
11	" 18	Dorothy Altman	18.00	Steno. services
12	" 24	Commerce Photoprint	7.71	Copying Services
13	" 25	U. S. Gov't Printing Office	1.30	Publications
			\$ 264.44	

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	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
14	Jan 27	Sunset Service	\$ 25.00	1/2 for Auto-
15	"	Shell Oil Co.	11.16	mobile
16	" 28	Dorothy Altman	36.50	1/2 for Auto-
17	" 29	New York Telephone Co.	7.98	mobile
18	" 21	Marine Midland Bank	1.50	Steno. services
19	" 22	" " "	1.50	Office telephone
20	" 24	" " "	1.50	Banking Charge
21	" 25	" " "	1.50	" "
22	"	" " "	1.50	" "
23	Feb 8	National Surety Corp.	4.58	" "
24	" 9	Goldsmith Bros.	15.87	Bond
25	"	Fordham Law Alumni	19.48	Office Supplies
26	"	Dorothy Altman	7.50	Dues
27	" 12	Dorothy Altman	20.00	Steno. services
28	" 19	Shell Oil Co.	28.00	Steno. services
29	"	Agnes Mannion	15.86	1/2 Automobile
30	"	Commerce Photoprint	37.50	Sten. services
31	" 21	Hanover Realty Co.	2.11	Photocopy
32	" 28	Adelphi Jud. Service	71.36	Case Charge
33	" 26	Marine Midland Bank	6.00	Process Service
34	Mar 4	Goldsmith Bros.	1.50	Charges
35	"	Lawyers & Merchants	9.21	Office Supplies
36	"	E. S. Dakin	20.00	Translation
37	" 8	New York Telephone Co.		Service
38	" 12	Dorothy Altman	7.50	Process service
39	" 13	N.Y. Press	78.82	Office Telephone
40	"	New York Telephone Co.	10.00	Steno. services
41	" 15	Secretary of State	6.18	Publication
			63.42	Office Telephone
			60.00	Incorporation
				fee

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	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
42	Mar 15	J. Blumberg	\$ 18.50	Corporate Outfit
43	"	Shell Oil Co.	91.32	1/2 Automobile
44	"	Forbes Magazine	15.00	Publication
45	"	Reporter Company	100.00	Printing
46	" 21	Commerce Photoprint	4.02	Copying
47	" 22	Able Messenger	3.10	Messenger service
48	"	Western Union	1.70	Telegraph
49	" 23	Clerk Civ. Court	4.00	Filing fee
50	" 30	Dorothy Altman	10.00	Steno. services
51	" 12	Marine Midland Bank	1.50	Charges
52	Apr 3	Maritime Law Assoc.	15.00	Dues
53	"	Reporter Company	100.00	Printing
54	"	New York Telephone Co.	2.95	1/2 home telephone
55	"	Commerce Photoprint	7.71	Photocopy
56	" 6	Dorothy Altman	16.00	Steno. services
57	" 10	Clerk Civ. Court	6.00	Filing fee
58	" 17	Christensen & Weiss	10.07	1/2 Automobile
59	"	County Clerk	50.00	Trial Fee
60	" 18	Shell Oil Co.	22.09	1/2 Automobile
61	"	Fordham Law Alumni	10.00	Dues
62	"	Lawyers & Merchants	5.00	Translations
63	"	Rigney Kochler & Co.	4.62	1/2 Automobile
64	"	Adelphi Jud. Service	2.50	Process service
65	"	Lawyers Photoprint	12.10	Photocopy
66	"	New York Times	23.90	Advertising
67	" 24	Surrogate's Court	21.10	Clerk's fees
68	" 25	Surrogate's Court	4.25	Clerk's fees
69	"	Goldsmith Bros.	1.29	Supplies
70	"	Dorothy Altman	24.00	Steno. services
71	" 15	Marine Midland Bank	1.50	Charges

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	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
72	May 6	New York Telephone Co.	\$ 7.79	1/2 home
73	"	M. Welles	25.00	telephone
74	" 7	Lawyers Photoprint	8.24	Medical
75	"	New York Telephone	59.82	Report
76	" 9	Fordham Law Review	2.00	Photocopy
77	" 11	Dorothy Altman	40.00	Phone
78	" 13	United Calif. Bank	51.60	Publication
79	"	Shell Oil Co.	35.44	Steno.
80	" 14	Court of Appeals	11.25	services
81	" 15	American Bar Assoc.	20.00	Charges-
82	"	Ulster County Treasurer	6.00	Transfers
83	" 18	Register Kings Co.	6.50	1/2 Automobile
84	" 21	U. S. Postmaster	60.10	Clerk's fees
85	" 22	State Tax Commission	25.00	Dues
86	"	U. S. Supreme Court	100.00	Tax for client
87	" 24	H. B. Blaikie	245.00	Clerk's fees
88	" 31	Kinney Service	75.00	Bond premium
89	"	Ulster County Treas.	.40	Transportation
90	"	Dorothy Altman	19.00	Tax for client
91	May 2	Marine Midland Bank	1.50	Steno. services
92	" 3	" " "	1.50	Charges
93	" 6	" " "	1.50	Charges
94	" 7	" " "	1.50	Charges
95	"	" " "	1.50	Charges
			1.50	Charges

805.64

	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
96	Jun 3	Court of Appeals		
97	" 5	Reporter Company	\$.50	Clerk's fee
98	"	Edward Grant	200.00	Printing
			201.30	Reporting serv.
99	"	Bankers Club		
100	"	New York Telephone Co.	281.25	Dues
101	" 6	Sol Diamond	91.15	Telephone
			500.00	Forwarding Fee
102	"	Rolind Steel	1,000.00	Investiga-
103	"	M. Moors		tive charges
			500.00	Forwarding Fee
104	" 7	Brennan Kennedy & Co.	32.50	Stationery
105	"	Report Magazine	4.00	Publication
106	" 10	Shell Oil Co.	12.84	1/2 Automob-
				ile
107	" 11	U. S. Gov't Printing Office	1.70	Publication
108	" 15	Dorothy Altman	24.00	Steno
				services
109	"	Clerk Civil Court	4.00	Fees
110	"	Maritime Law Assoc.	10.00	Dues
111	" 17	Insurance Society of America	10.00	Dues
112	"	RCA Communications	10.45	Cable
113	" 19	New York Telephone Co.	11.39	1/2 Home
				Telephone
114	" 21	Central Bureau Reg. Adds	15.00	Register fees
115	"	American Bar Association	20.00	Dues
116	" 24	Edward Grant	28.35	Reporting serv.
117	"	S. Welberg	100.00	Forwarding Fee
118	" 25	Dorothy Altman	14.00	Steno
				Services
119	"	Goldsmith Bros.	1.65	Supplies
120	" 26	All State Insurance Co.	22.85	1/2 Automob-
				ile
121	" 27	Queens County Bar	.35	Dues
122	" 28	PLI	35.00	Professional dues

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123	Jul	8	Hertz Corp.	\$	21.75	Transportation
124	"		Adelphi Judicial Service		4.00	Process Server
125	"		New York Telephone Co.		51.05	Telephone
126	"	9	New York Telephone Co.		10.01	Telephone
127	"	10	Federal Court Reporter		91.25	Reporting serv.
128	"	15	L. Winston		15.00	Process Server
129	"	16	Rolind Steel Co.		500.00	Investigations
130	"	8	Bankers Trust		11.88	1/2 Automobile
131	"	16	Goldsmith Bros.		12.78	Stationery
132	Jul	16	Shell Oil Co.		23.43	1/2 Automobile
133	"	22	RCA Communications		3.03	Cable
134	"		Goldsmith Bros.		.40	Stationery
135	"	23	Queens County Bar		25.00	Dues
136	"	26	Queens County Register		6.00	Fees
137	"		New York Telephone Co.		1.16	Telephone
138	"		New York Telephone		10.84	1/2 home phone
139	"	31	State Tax Commission		294.97	Taxes for client
140	Aug	2	Commercial Photoprint		65.31	Photocopying
141	"		Consol. Exterminators		54.00	Fees
142	"	9	Dept. Motor Vehicles		9.50	Reports
143	"		Christensen & Weiss		4.47	1/2 Automobile
144	"	12	Shell Oil Co.		19.06	1/2 Automobile
145	"		Charles Saling		11.00	Advance of costs
146	"	13	Adelphi Judicial Service		2.00	Process Server
147	"	19	Dorothy Altman		30.00	Steno services
148	"		Hertz Corp.		18.13	Transportation
149	"	22	County Clerk		50.00	Trial Fee
150	"		Charles Saling		713.10	Fees (Attorney's)
151	"	28	Queens Co. Register		8.00	Fees
152	"		Marine Claims Agent		9.50	Dues
153	"		New York County Lawyers		35.00	Dues
154	"		All State Insurance Co.		30.65	1/2 Automobile
155	"	17	Christensen & Weiss		57.37	1/2 Automobile

41

448

	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
156	" Sep 3	New York Telephone Co.	\$ 10.69	1/2 Home Telephone
157	"	Goldsmith Bros.	33.72	Supplies
158	" 4	Estelle Scher	25.71	Steno. services
159	" 8	Bankers Trust Co.	32.71	1/2 Auto plus int.
160	"	Commerce Photoprint	7.49	Photocopying
161	" 9	Civil Court New York Co.	4.00	Filing Fee
162	"	New York Telephone Co.	7.57	Telephone
163	" 12	Surrogate's Court	35.00	Filing Fee
164	"	Luis Vigdor	50.00	Translations
165	" 13	Shell Oil Co.	15.41	1/2 Automobile
166	"	Surrogate's Court	18.15	Fees
167	" 15	Assoc. of Aver. Adj.	265.00	Rent/dues
168	" 18	Dorothy Altman	60.00	Steno. services
169	" 19	Surrogate's Court	3.00	Fee
170	" 20	Sheriff New York Co.	7.70	Fee
171	"	Civil Court	4.00	Fee
172	"	L. R. Coleman	12.00	Fees for investig.
173	" 24	Surrogate's Court	1.00	Entertainment
174	Sep 25	Ben Scholnick	300.00	Investigation
175	" 27	F. H. Brewer	3.75	Reporting Serv.
176	"	Surrogate's Court	5.10	Fees
177	" 28	Dorothy Altman	32.00	Steno services
178	" 30	Charles Saling	64.00	Fees (Atty's)
179	" 3	Marine Midland Bank	1.50	Charges
180	" 12	Christensen & Weiss	82.55	1/2 Automobile

\$ 1082.05

	<u>Date</u>	<u>Pavee</u>	<u>Amount</u>	<u>Purpose</u>
181	Oct 2	Lawyers & Merchants	\$ 29.40	Translation
182	"	Maritime Law Assoc.	15.00	Dues
183	" 4	Dorothy Altman	34.00	Steno. services
184	" 5	John F. Lennon	450.00	Forwarding Fee
185	"	Civil Court	4.00	Fee
186	" 8	Commerce Photoprint	21.62	Photocopying
187	" 10	Frank Magadan	10.00	Porter service
188	" 17	Southgate	10.00	Travel Accom.
189	"	Christensen & Weiss	40.98	1/2 Automobile
190	"	Shell Oil Co.	34.12	1/2 Automobile
191	"	R. J. Carmon	15.00	Services
192	" 18	U. S. Marshal	175.00	Fees
193	" 25	New York Telephone Co.	25.14	Telephone
194	"	Dorothy Altman	15.00	Steno. services
195	"	New York Law Journal	48.00	Publication
196	"	U. S. Gov't Print	.80	Publication
197	"	Civil Court	4.00	Fees
198	" 28	Civil Court	13.50	Fees
199	" 3	Bankers Trust Co.	98.15	1/2 Automobile
200	" 9	Marine Midland Bank	1.50	Charge
201	" 10	" " "	1.50	Charge
202	" 11	" " "	1.50	Charge
203	" 17	" " "	1.50	Charge
204	" 21	" " "	1.50	Charge
205	" 23	" " "	1.50	"
206	"	" " "	1.50	"
207	" 25	" " "	1.50	"
208	Nov 1	New York Telephone	23.87	Telephone
209	" 2	Lawyers & Merchants	10.00	Translation
210	" 6	" " "	4.00	"
211	"	Brennan & Kennedy	69.50	Stationery
212	" 14	Abraham & Jacobs	169.60	Fees of Attorneys
213	" 15	Queens County Bar	10.00	Dues
214	" 19	U. S. Marshal	14.20	Fees
215	" 20	Shell Oil Co.	36.92	1/2 Automobile
216	" 25	John F. Curry Agency	3.68	Insurance charge
217	" 26	Adelphi Jud. Service	6.00	Process server
218	"	W. E. Devoe, Sr.	5.80	Services
219	"	New York Telephone Co.	40.52	1/2 home telephone

\$ 1,449.80

	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Purpose</u>
220	Dec 2	New York Telephone Co.	\$ 12.87	Telephone
221	"	Brennan & Kennedy	14.50	Stationery
222	" 4	Fund	10.00	Bond premium
223	"	American Cable & Radio	9.55	Cable
224	"	Dorothy Altman	14.00	Steno. services
225	" 6	J. B. Brookes	30.00	Advances to client
226	" 10	Christensen & Weiss	4.42	1/2 Automobile
227	" 12	Shell Oil Co.	12.58	1/2 Automobile
228	" 17	PLI	25.00	Publication
229	"	Fund Insurance Co.	10.00	Bond premium
230	Dec 18	Sheriff New York County	8.30	Fees
231	" 19	J. Blumberg, Inc.	22.73	Corporate Outfit
232	"	Sheriff New York County	3.80	Fee
233	"	PLI	10.00	Publication
234	" 23	RCA	9.90	Cable
235	"	Dorothy Altman	32.00	Steno. services
236	"	Fordham Alumni	10.00	Dues
237	"	R. B. Blaikie	10.00	Bond premium
238	"	American Jud. Soc.	10.00	Dues
239	" 26	Satys Travel Agency	44.84	Travel charges
240	" 27	New York Telephone Co.	29.97	1/2 home telephone
241	" 30	New York Telephone Co.	57.99	Telephone
242	"	Satys Travel Service	22.62	Travel Charges
243	" 31	Secretary of State	60.00	Corporate fees
244	" 2	Marine Midland Bank	1.50	Charges
245	"	" " "	1.50	"
246	"	" " "	1.50	"
247	" 4	" " "	1.50	"
TOTAL			\$10,575.67	

9. Exhibit B is a partial catalogue of items contested by the United States. (Page numbers refer to Exhibit A which is a schedule of taxpayers' claimed business expenditures for 1963.)

451

ITEMS CONTESTED BY THE UNITED STATES

Page 1 (Admitted \$ 406.58)

1/4	Bankers Club	\$	75.46
1/29	Ascan Avenue Ass'n		178.41
TOTAL CONTESTED		\$	253.87

Page 2 (Admitted \$ 1,350.58)

2/9	West Side Tennis Club	\$	500.00
2/19	Con Ed		34.68
2/28	Brooklyn Union Gas		7.80
2/28	Ascan Ave. Ass'n		178.41
3/4	Thos. Jefferson Club		10.00
3/7	West Side Tennis Club		232.92
3/13	West Side Tennis Club		43.51
3/15	Italy American Chamber of Commerce		100.00
3/19	John F. Lennon		450.00
3/19	Marquet Studio		63.50
3/26	Brooklyn Union Gas		2.81
3/26	Ascan Ave. Ass'n		178.41
3/28	Italy American Chamber of Commerce.....		12.50
4/3	Bankers Club		136.65
4/5	Atlantic Beach Club		195.00
TOTAL CONTESTED		\$	2,146.19

(179.00)

ITEMS CONTESTED BY THE UNITED STATESA 452

Page 3 (Admitted \$1,303.22)

4/5	West Side Tennis Club	\$	19.75	
4/24	Fordham Law Alumni		482.15	
4/25	Ascan Ave. Ass'n		178.41	
4/25	Con Edison		16.74	
4/29	Ascan Ave. Assoc.		178.41	
5/7	Bankers Club		9.12	
5/7	Maritime Law Assoc.		30.00	✓
5/9	West Side Tennis Club		10.52	
5/21	Brooklyn Union Gas		3.34	
5/22	State Tax Commission		25.00	✓

TOTAL CONTESTED \$ 953.44

Page 4 (Admitted \$3,866.84)

6/5	Bankers Club	\$	307.93	
6/5	Atlantic Beach Club		579.60	
6/6	Michael Civetta		55.00	
6/7	West Side Tennis Club		43.60	
6/25	Con Edison		20.01	
6/25	Raines & Gutman		225.00	
6/16	West Side Tennis Club		15.00	
6/21	Cash		75.00	
6/26	Atlantic Beach Club		40.81	
6/26	National Surety Corp.		867.67	
6/28	George De Foto		135.00	
7/8	Bankers Club		30.72	
7/8	Atlantic Beach Club		10.16	
7/10	West Side Tennis Club		216.51	
7/11	Atlantic Beach Club		43.76	

TOTAL CONTESTED \$ 2,665.77

ITEMS CONTESTED BY THE UNITED STATES

A 453

Page 5

(Admitted \$1,955.33)

7/22	Brooklyn Union Gas	\$	3.63
7/22	J. Brown		35.00
7/23	Atlantic Beach Club		72.50
7/24	Atlantic Beach Club		103.37
7/31	Shakespeare Festival		18.00
7/31	Ascan Ave. Assoc.		178.71
7/1	Ascan Ave. Assoc.		356.82
7/3	Surrogate's Court		20.00
8/5	Nussbaums		24.82
8/8	West Side Tennis Club		7.60
8/8	Bankers Club		22.76
8/12	Cash		50.00
8/14	Atlantic Beach Club		24.90
8/15	Cash		50.00
8/23	Con Ed.		63.74
9/3	Atlantic Beach Club		10.00
9/3	West Side Tennis Club		45.23
9/5	Bankers Club		22.63

TOTAL CONTESTED \$ 1,109.71

ITEMS CONTESTED BY THE UNITED STATES

4 454

Page 6 (Admitted \$2,318.14)

9/13	Atlantic Beach Club	\$	60.75
9/17	Brooklyn Union Gas		3.68
9/25	Atlantic Beach Club		20.25
10/5	Ascan Ave. Assoc.		356.82
10/8	West Side Tennis Club		39.90
10/12	Tiro A. Segno		43.50
10/17	Con Edison		25.29
10/17	Men's Club of Forest Hills		10.00
10/28	Italy Chamber of Commerce		50.00
10/30	Women's Club of Forest Hills		22.00

TOTAL CONTESTED \$ 632.19

Page 7 (Admitted \$1,134.45)

11/8	West Side Tennis Club	\$	8.00
11/27	J. F. Thomassen		36.46
11/27	Brooklyn Union Gas		2.85
12/3	Bankers Club		71.72
12/5	Ascan Ave. Assoc.		356.82
12/9	Bankers Club		24.29
12/9	Cash		100.00
12/19	Con Edison		17.76
12/19	F. Scialo		20.00
12/20	Cash		40.00

TOTAL CONTESTED \$ 677.90

Page 8 (Admitted \$140.73)

TOTAL CONTESTED \$ 0.00

ITEMS CONTESTED BY THE UNITED STATES

A

455

TOTAL ADMITTED

Pages	1	.....	\$	406.58
	2	.....		1,350.58
	3	.....		1,303.22
	4	.....		3,866.84
	5	.....		1,955.33
	6	.....		2,318.14
	7	.....		1,134.45
	8	.....		<u>140.73</u>

..... \$ 12,475.87

TOTAL CONTESTED

Pages	1	.....	\$	253.87
	2	.....		2,146.19
	3	.....		953.44
	4	.....		2,665.77
	5	.....		1,109.71
	6	.....		632.19
	7	.....		677.90
	8	.....		<u>0.00</u>

..... \$ 8,439.07

AMOUNT ADMITTED ATTRIBUTED TO:

Interest Charges	.....	\$ 1,878.72
Contributions	.....	\$ 303.00

The United States also contests additional petty cash, travel, entertainment expenses, and other expenses of the taxpayers.

The United States also contends that certain interest payments on loans and contributions made by the taxpayers are not deductible as ordinary and necessary expenses but as itemized personal deductions.

10. The taxpayers are entitled to a deduction of 25% of the rent paid for their apartment in Forest Hills, New York as an ordinary and necessary expense incurred in the conduct of the lawyer-taxpayer's practice of law. Thus, the following deductions from Professional Income are allowed:

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
1/29/63	Ascan Avenue Assn.	\$ 44.60
2/28/63	Ascan Avenue Assn.	44.60
3/26/63	Ascan Avenue Assn.	44.60
4/25/63	Ascan Avenue Assn.	44.60
7/31/63	Ascan Avenue Assn.	44.60
9/-1/63	Ascan Avenue Assn.	89.20
10/5/63	Ascan Avenue Assn.	89.20
12/5/63	Ascan Avenue Assn.	<u>89.20</u>
	TOTAL	<u><u>\$ 490.60</u></u>

A 157

The balance (75%) of these expenditures is disallowed.

Evidence offered by the taxpayers was insufficient to justify any deduction beyond 25% of the total rent paid. No single room was set aside as an office. The taxpayers asserted that every room, including the several bedrooms, bathrooms and kitchen, was used for business purposes.

11. The taxpayers are entitled to a deduction of 25% of the bills paid for electrical utilities in their apartment as an ordinary and necessary expense incurred in the conduct of the lawyer-taxpayer's practice of law. Thus, the following deductions from Professional Income are allowed:

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
2/19/63	Con Edison	\$ 8.67
4/25/63	Con Edison	4.18
6/25/63	Con Edison	5.00
8/23/63	Con Edison	15.63
10/17/63	Con Edison	6.32
12/19/63	Con Edison	<u>4.44</u>
TOTAL		<u>\$ 44.24</u>

The balance (75%) of these expenditures is disallowed.

12. The taxpayers are not entitled to any deduction for their apartment gas bills since these bills were not ordinary and necessary business expenses incurred by the lawyer-taxpayer in the conduct of his law practice. The following items are, therefore, disallowed:

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
2/28/63	Brooklyn Union Gas	\$ 7.80
3/21/63	Brooklyn Union Gas	2.81
5/21/63	Brooklyn Union Gas	3.34
7/22/63	Brooklyn Union Gas	3.63
9/17/63	Brooklyn Union Gas	3.68
11/27/63	Brooklyn Union Gas	2.85
	TOTAL	<u>\$ 24.11</u>

13. The taxpayers are not entitled to deduct as ordinary and necessary business expenses incurred in the conduct of the lawyer-taxpayer's law practice dues paid to the West Side Tennis Club, the Atlantic Beach Club, the Thomas Jefferson Democratic Club, the Italy-American Chamber of Commerce, the Men's Club of Forest Hills and the Women's Club of Forest Hills. Thus, the following claimed deductions from Professional Income are disallowed:

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
3/4/63	Thomas Jefferson Democratic Club	\$ 10.00
3/7/63	West Side Tennis Club	\$ 232.92
3/15/63	Italy-American Chamber of Commerce	\$ 100.00
3/28/63	Italy American Chamber of Commerce	\$ 12.50
4/-5/63	Atlantic Beach Club	\$ 116.00
6/-5/63	Atlantic Beach Club	\$ 579.60
7/10/63	West Side Tennis Club	\$ 216.51
10/17/63	Men's Club of Forest Hills	\$ 10.00
10/30/63	Women's Club of Forest Hills	\$ 22.00
	TOTAL	<u>\$1,299.53</u>

The taxpayers failed to produce any documentary or other credible evidence that these clubs were used primarily for business purposes. No chronological log of club uses was kept, as required by regulation. 26 C.F.R. § 1.274-5(c)(6)(iii). Even the unsupported testimony of Anthony Cataldo compelled the conclusion that these clubs were primarily for family and personal use.

14. The taxpayers are entitled to claim the following claimed Entertainment charges as valid deductions as ordinary and necessary expenses incurred in the operation of the lawyer-taxpayer's profession:

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
4/5/63	Atlantic Beach Club	\$ 79.00
5/7/63	Maritime Law Association	\$ 30.00
	TOTAL	<u>\$ 109.00</u>

15. Because of their failure to produce adequate documentary evidence as required by Sections 162 and 274 of the Code and Section 1.274-5 of the Income Tax Regulations, the taxpayers are not entitled to the following claimed Entertainment expenses as valid business deductions:

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
1/4/63	Bankers Club	\$ 75.46
2/9/63	West Side Tennis Club	500.00
3/13/63	West Side Tennis Club	43.51
4/5/63	West Side Tennis Club	19.75
4/24/63	Fordham Law Alumni	482.15
5/7/63	Bankers Club	9.12
5/9/63	West Side Tennis Club	10.52
6/5/63	Bankers Club	26.68
6/7/63	West Side Tennis Club	43.60
6/16/63	West Side Tennis Club	15.00
6/21/63	Cash	75.00
6/26/63	Atlantic Beach Club	40.81

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
7/8/63	Bankers Club	\$ 30.72
7/10/63	Atlantic Beach Club	10.16 —
7/11/63	Atlantic Beach Club	43.76
7/23/63	Atlantic Beach Club	72.50
7/24/63	Atlantic Beach Club	103.37
8/-5/63	Nussbaums	24.82 —
8/8/63	West Side Tennis Club	7.60 —
8/8/63	Bankers Club	22.76 —
8/14/63	Atlantic Beach Club	24.90 —
8/15/63	Cash	50.00
9/3/63	Atlantic Beach Club	10.00 —
9/3/63	West Side Tennis Club	45.23
9/5/63	Bankers Club	22.63 —
9/13/63	Atlantic Beach Club	60.75
9/25/63	Atlantic Beach Club	20.25 —
10/8/63	West Side Tennis Club	39.90
10/12/63	Tiro A. Segno	43.50
10/30/63	Italy Chamber of Commerce	50.00
11/8/63	West Side Tennis Club	8.00 —
12/3/63	Bankers Club	71.72
12/9/63	Bankers Club	24.29 —
	TOTAL	<u>\$ 2,128.46</u>

For these claimed Entertainment expenses the taxpayers failed to offer either credible supporting testimony or sufficient documentary evidence. The evidence was limited to a sparse sampling of bills and vouchers from some of the clubs to which the taxpayers belonged. These items contained no identification of the clients entertained or the business matters discussed. Some of these bills were signed by Ada W. Cataldo and the taxpayers' children.

16. The taxpayers are entitled to deduct the following Case Charges as ordinary and necessary expenses incurred in the lawyer taxpayer's business:

3/19/63	John F. Lennon	\$ 450.00
3/19/63	Marquet Studio	63.50
5/22/63	State Tax Commission	25.00
6/-6/63	Michael Civetta	55.00
6/28/63	George De Foto	135.00
7/22/63	J. Brown	35.00
7/-3/63	Surrogate's Court	20.00
8/15/63	Cash	50.00
12/20/63	Cash	40.00
	TOTAL	<u>\$ 873.00</u>

17. The taxpayers are not entitled to deduct any of the following Case Charges as an ordinary and necessary expense incurred in the operation of the lawyer-taxpayer's business:

6/25/63	Raines & Gutman	\$ 225.00
6/26/63	National Surety Corp.	867.67
8/15/63	Cash	50.00
11/27/63	J. F. Thomassen	36.46
12/-9/63	Cash	<u>100.00</u>
TOTAL		<u>\$ 1,279.13</u>

The taxpayers failed to document the above-listed items as ordinary and necessary business expenses. The oral testimony of the lawyer-taxpayer at trial was unsupported by documentary evidence.

The \$225 payment to Raines & Gutman was described at trial by Mr. Cataldo as an advance made on behalf of G. O. General Contracting Company in settlement of a claim against this client. Likewise, the payment of \$867.67 to National Surety Corp. was allegedly made by Mr. Cataldo as guarantor of the same company's bond. These are obviously not a lawyer's business expenses. They are loans made to the client and can only be deducted in the year when written off as

uncollectible bad debts. This was not done in 1963, if ever.

The \$50 cash payment was described as pocket money to buy a few drinks for some business acquaintances after a round of golf. No explanation was offered for the payment to J. F. Thomassen. Finally, the \$100 cash payment was claimed to be made on behalf of a client for a month's rent. No documentary evidence that a corresponding payment of \$100 was included in the following year's income was offered by the taxpayers. All of these items are disallowed.

18. The taxpayers have failed to produce any evidence to document their claim of Petty Cash, Travel and Entertainment expenses in the amount of \$3,823.78. Accordingly, no part of this claimed ordinary and necessary business expense may be deducted from Professional Income.

At trial the government contested the entire amount claimed as a deduction for Petty Cash, Travel and Entertainment expenses. The Appellate Conferee had allowed all items less than \$25, the total being \$2,230.23. The Appellate Conferee had disallowed all items over \$25, the total being \$1,593.55. The government is entitled to depart from the position set forth by the Commissioner in the notice of deficiency previously sent to the taxpayers. In a tax refund action, unlike a Tax Court action, the burden of proof with respect to additionally contested items is placed upon the taxpayer.

The taxpayers in this action failed totally to meet their burden.

The only proof with respect to Petty Cash expenditures at trial was by reference to the lawyer-taxpayer's office diary for 1963, which has been lost. The fact that the diary has been lost is lamentable. Unfortunately, its loss does not suffice to substantiate or justify the claimed deduction.

19. The taxpayers are not entitled to claim the below-listed Interest Charges as ordinary and necessary expenses incurred in the conduct of the lawyer-taxpayer's profession. However, the taxpayers are entitled to claim these Interest Charges as itemized personal deductions from adjusted gross income:

1/18/63	Marine Midland Bank	\$ 25.07
1/18/63	Marine Midland Bank	122.07
2/13/63	Marine Midland Bank	128.84
2/27/63	Marine Midland Bank	4.10
3/-4/63	Manufacturer's Hanover Trust	20.00
3/-8/63	Manufacturer's Hanover Trust	5.50
3/12/63	Marine Midland Bank	142.10
3/26/63	Marine Midland Bank	3.87

4/-3/63	Manufacturer's Hanover Trust	\$ 20.00
4/12/63	Marine Midland Bank	141.58
4/24/63	Marine Midland Bank	4.31
5/31/63	Manufacturers' Hanover Trust	8.00
5/13/63	Marine Midland Bank	118.85
5/13/63	Marine Midland Bank	22.22
5/24/63	Marine Midland Bank	6.30
6/-4/63	Manufacturers Hanover Trust	24.00
6/-4/63	Manufacturers Hanover Trust	24.00
6/-4/63	Manufacturers Hanover Trust	16.00
6/14/63	Manufacturers Hanover Trust	4.00
6/14/63	Marine Midland Bank	144.05
6/26/63	Marine Midland Bank	4.70
7/17/63	Manufacturers Hanover Trust	8.00

7/15/63	Marine Midland Bank	\$ 468 19.63
7/15/63	Marine Midland Bank	118.83
8/-2/63	Bankers Trust Co.	1.75
8/-7/63	Bankers Trust Co.	.75
8/15/63	Marine Midland Bank	122.67
8/15/63	Marine Midland Bank	19.73
9/-6/63	Manufacturers Hanover Trust	8.00
9/-8/63	Manufacturers Hanover Trust	8.00
9/15/63	Marine Midland Bank	115.00
9/15/63	Marine Midland Bank	18.00
10/31/63	Manufacturers Hanover Trust	24.00
10/17/63	Marine Midland Bank	145.77
10/29/63	Marine Midland Bank	3.53
11/18/63	Marine Midland Bank	115.00
11/18/63	Marine Midland Bank	20.00
11/27/63	Marine Midland Bank	3.26
12/18/63	Marine Midland Bank	19.50
12/18/63	Marine Midland Bank	115.00
12/27/63	Marine Midland Bank	1.73

TOTAL	\$ 1,877.51
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No evidence was adduced by the taxpayers to demonstrate that the interest charges paid during 1963 were in any way business related. No evidence at all was offered to show that the underlying loans were taken out to make payments for the running of the law office, e.g., salaries, purchase of furniture or equipment, library expenses, etc. On cross-examination it was shown that Mr. Cataldo had to meet considerable personal and family expenses during 1963, e.g., room, board and tuition for two college-age daughters. Thus, although the interest charges could not be deducted from professional income as ordinary and necessary business expenses, they could be taken as an itemized personal deduction from adjusted gross income.

20. The taxpayers are not entitled to claim the below-list contributions as ordinary and necessary expenses incurred in the conduct of the lawyer-taxpayer's profession. However, the taxpayers are entitled to claim these Contributions as itemized personal deductions from adjusted gross income:

1/18/63	Brooklyn Home for Boys	\$ 40.00
1/18/63	Boy Scouts of America	10.00
1/25/63	Women's Guild of The Church in the Gardens	5.50
3/-4/63	Church in the Gardens	10.00
3/13/63	Mt. Manresa Retreat	10.00
5/3/63	Mt. Manresa Retreat	25.00
6/-5/63	Church in the Gardens	13.00
6/-8/63	Big Brothers, Inc.	10.00
6/21/63	Kings County War Vets	10.00
6/24/63	Rev. Joseph McCloskey	10.00
6/26/63	American Academy	8.00
6/28/63	Bayridge Meth. Church	10.00
7/-8/63	YWCA Scholarship	15.00
8/-1/63	Brooklyn Home for Boys	20.00
9/24/63	Highland Park YMCA	5.00
10/20/63	Women's Guild	5.50
11/1/63	League of Women's Voters	15.00
11/2/63	Women's Guild	49.00
12/17/63	Celebrities Assn. F.H.	5.00
TOTAL		\$ 306.00

Section 162(b) of the Code precludes the deduction of charitable contributions as an ordinary and necessary business expense. However, insofar as substantiated, these contributions may be taken as itemized personal deductions pursuant to Section 170 of the Code.

21. The taxpayers are not entitled to claim the following payment as a charitable contribution under any section of the Code:

7/31/63	Shakespeare Festival	\$ 18.00
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The taxpayers paid \$18 for two seats at the Shakespear Festival in Stratford, Connecticut. They went to see the production and thus received value for the money paid. No charitable contribution was involved.

22. The lawyer-taxpayer realized a net profit of \$17,658.07 from the operation of his law practice (allowable business income minus allowable business deductions).

23. The taxpayers have produced satisfactory evidence entitling them to deductions for ordinary and necessary business expenses in the total amount of \$12,092.51.

24. The taxpayers realized an adjusted gross income (line 9, page 1 of Form 1040) of \$17,642.52. This amount was computed by

adding Professional Income of \$17,658.07, Interest Income of \$62.45, and Dividend Income of \$922 and by subtracting Net Losses from the sale of Capital Assets of \$1,000.

25. The taxpayers have produced evidence substantiating the following itemized personal deductions:

Contributions	\$ 306.00
Interest Expense	1,886.21
Taxes	238.50
Medical and Dental Expense	510.94
Other Deductions	<u>0.00</u>
TOTAL	<u><u>\$ 2,941.65</u></u>

With respect to Contributions, the taxpayers failed to produce any evidence other than Mr. Cataldo's own unsupported testimony. Accordingly, none of these alleged additional contributions was allowed.

Interest expense amounted to \$8170 paid to Hornblower & Weeks. Nothing further was claimed.

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473

is allowed. Total taxes, therefore, amount to \$238.50, as claimed on the return.

26. The allowable medical and dental expenses have been revised downward reflecting an increase in adjusted gross income as follows:

1. Total cost of medicine and drugs	\$ 685.87
2. Enter 1% of line 9, page 1	176.42
3. Subtract line 2 from line 1	509.45
4. Other medical, dental expenses	530.75
5. Total (add lines 3 and 4)	1,040.20
6. Enter 3% of line 9, page 1	529.26
7. Subtract line 6 from line 5	510.94

Total Itemized Deductions amount to \$2,941.65.

27. The taxpayers are entitled to four personal exemptions in the total amount of \$2,400.

28. The taxpayers' taxable income for 1963 was \$12,300.87. This is computed by subtracting Itemized Deductions (\$2,941.65) and Personal Exemptions (\$2,400) from Adjusted Gross Income (\$17,642.52).

29. The taxpayers incurred a tax of \$2,800.60. For 1963 the applicable tax rate for joint returns was \$2,720 plus 30% on income over \$12,000. This amount (\$2,810.26) was reduced by a tax credit of \$9.66 for dividends received.

30. The lawyer-taxpayer incurred a self-employment tax of \$259.20. Since the net profit from the lawyer-taxpayer's profession exceeded \$4,800, the maximum tax of \$259.20 is applicable.

31. The taxpayers incurred a total tax of \$3,059.80.

32. Prior to filing a claim for refund, the taxpayers had paid total taxes for 1963 of \$2,497.34. At the time of filing their return, the taxpayers paid \$286.54. When they filed their claim for refund, the taxpayers paid an additional \$2,210.80 in tax, plus interest.

33. In summary, I find that the taxpayers are entitled to no refund.

DISCUSSION

An income tax refund suit pursuant to 28 USC § 1346(a)(1) is in the nature of an action for money had and received. *Lewis v. Reynolds*, 284 U.S. 281 (1932); *Alvary v. United States*, 302 F. 2d 790 (2d Cir. 1962). The burden, therefore, is upon plaintiffs in such an action to prove that the tax, or a specified portion thereof, was never owing to the United States in the first instance. Consequently the taxpayers must establish not only that the tax assessment was erroneous; they must demonstrate the correct amount of the tax. A presumption of correctness attaches to the deficiency assessment made by the Commissioner. *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Pizzarello v. United States*, 408 F. 2d 570, 583 (2d Cir. 1969), cert. denied, 396 U.S. 986.

Section 162 of the Internal Revenue Code, 26 USC § 162, allows for the deduction of certain ordinary and necessary business expenses. It is incumbent upon the taxpayers to justify the allowance of each deduction claimed. Such deductions are a matter of "legislative grace," *White v. United States*, 305 U.S. 281 (1938), and "are strictly interpreted and the taxpayer who asserts the deduction must demonstrate the applicable section to his own affairs." *Huene v. United States*, 247 F. Supp. 564, 570 (S.D.N.Y. 1965). See also, *Deputy v. DuPont*, 308 U.S. 488, 493 (1940). The Code explicitly

provides that no deduction will be allowed "for personal, living, or family expenses." 26 USC § 262.

Another bar to recovery is presented by Section 274 of the Code, which requires that entertainment expenses may be allowed as business deductions only where the expense was incurred "directly preceding or following a substantial and bona fide business discussion ***." 26 USC § 274(a)(1). Subsection (d) further requires that the taxpayer substantiate entertainment expenses "by adequate records or by sufficient evidence corroborating his own statement," 26 USC § 274(d). The records must set forth the amount of the expense, the time and place of the entertainment, the business purpose of the expenditure and the business relationship of the taxpayer to the person entertained. The Commissioner is given authority to implement the substantiation requirements by appropriate regulations. The substantiation requirements are fully set forth in Income Tax Regulations, § 1.274-5.

The taxpayers have attempted to include contributions in the amount of \$855 as an ordinary and necessary business expense. From the explicit provisions of Section 162(b) it is clear that such contributions are not allowable as business expenses.

At trial the United States contested the entire amount claimed as a deduction for Petty Cash, Travel, and Entertainment

expenses. The Appellate Conferee had allowed all items less than \$25, the total being \$2,230.23. The Appellate Conferee had disallowed all items over \$25, the total being \$1,593.55. At issue is whether the United States is entitled to depart from the position set forth by the Commissioner -- is the United States bound by the ruling of the Commissioner?

Courts have consistently held that a tax refund suit is in the nature of an action for money had and received, *Lewis v. Reynolds*, 284 U.S. 281 (1932); *Alvary v. United States*, 302 F. 2d 790 (2d Cir. 1962), and, therefore, the taxpayer must demonstrate the correct amount of the tax that is due. See, also, *Helvering v. Taylor*, 293 U.S. 507, 514-515 (1935). This rationale is inapposite to matters before the Tax Court where the burden of proof is on the government. 6 CCH, Federal Tax Reporter ¶ 5853.025.

In any event, there is the presumption that the assessment (not the statutory deficiency notice) is, on its face, correct. *Welch v. Helvering*, 290 U.S. 111, 115 (1933). The taxpayer, not the United States, has the burden of proof at trial where the United State asserts a different theory or additional deficiencies from that stated in the deficiency notice. *David v. Phinney*, 350 F. 2d 371, 374-375 (5th Cir. 1965); *Roybark v. United States*, 218 F. 2d 164 (9th Cir. 1954); *William duPont, Jr., et al. v. United States*, 64-1 U.S.T.C.

9123 (D.Del. 1963). In short, a tax refund suit is an action for money had and received and, therefore, the United States is not bound at trial by prior rulings of the Commissioner.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter and the parties to this action.
 2. Plaintiffs are not entitled to a tax refund for the year 1963.
 3. Judgment is granted to the United States dismissing the complaint with prejudice.
 4. Costs of the action are awarded to the United States.
- Settle judgment on notice in accordance herewith.

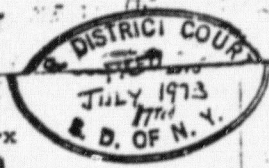
Dated: New York, N.Y.
June 29, 1973.

Richard H. Lerer
United States District Judge

2/22/77
ape

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By R. Harrison
Deputy Clerk

4 479



SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs,

JUDGMENT

v.

69 Civ. 407

UNITED STATES OF AMERICA,

Defendant.

A trial in this action having been held on May 9, 10, 11 and 14, 1973, and the Court having issued its Opinion, Findings of Fact and Conclusions of Law on June 29, 1973, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs take nothing, that judgment is hereby granted to the defendant, United States of America, and that the complaint is dismissed with prejudice; and it is further

ORDERED, ADJUDGED AND DECREED that the costs of this action, as fixed by the Clerk of the Court, are hereby awarded to the defendant, United States of America.

Dated: New York, New York

July 13, 1973

Richard D. Leret
United States District Judge

TRUE COPY
BY *Raymond F. Burghardt*
Deputy Clerk

JUDGMENT ENTERED JUL 17 1973

Raymond F. Burghardt
Clerk

7/13/73 - No appearance in opposition
Bill of Costs taxed in favor of U.S.A.
on 7/17/73 in the amount of \$104.00 and
docketed as Jud # 73,613
Raymond F. Burghardt
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
: ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants, :

-against- :

UNITED STATES OF AMERICA, :

Defendant-Appellee. :

73-2602

-----X
APPELLANTS' BRIEF

Exhibit G

ANTHONY B. CATALDO
~~XXXXXXXXXXXX~~
NEW YORK S. N. Y.
111 Broadway

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS INVOLVED	1
PRIOR PROCEEDINGS	1
FACTS	3
POINT I THE COURT BELOW ERRED IN CALCULATING THE NET INCOME	9
POINT II THE COURT'S INSISTENCE UPON AN UNSPECIFIED FORM OF CORROBORATION IN RESPECT OF PLAINTIFF'S CLAIMS WAS UNLAWFUL	12
POINT III THE BURDEN OF PROOF WAS MIS- APPLIED AS TO THOSE ITEMS WHICH DEFENSE COUNSEL ADDED TO THE DISALLOWANCES OF THE ASSESSMENT AND TO THE INACCURACIES OF THE DISALLOW- ANCES BY THE DEFICIENCY	14
POINT IV CONTRIBUTIONS WERE ERRONEOUSLY HANDLED BY THE COURT	20
POINT V A BUSINESS EXPENSE IS AN ORDINARY AND NECESSARY EXPENSE INCURRED IN THE BUSINESS OF THE TAXPAYER, A FACTOR IGNORED BY THE COURT BELOW	22
Raines & Gutman	22
National Surety Corp.	26
The \$100. rent check	28

TABLE OF CONTENTS

	<u>Page</u>
The payments to Italy- America Chamber of Commerce	29
Petty Cash Disbursements	30
Expense of going business at home	32
Seven miscellaneous items that were improperly dis- allowed as business expenses	34
Club dues and expenses of entertainment	36
Bankers Club	42
The West Side Tennis Club and The Atlantic Beach Club	43
Interest Charges	45
POINT VII THE MANY EVENTS WHICH COMBINED TO DEPRIVE PLAINTIFFS OF A FAIR TRIAL	47
CONCLUSION	50

TABLE OF CASES

	<u>Page</u>
<u>Baird v. Comm'r.</u> , 438 F. (2) 490	15
<u>Ballou v. U.S.</u> , 370 F. (2) 659 c.d. 388 U.S. 911	13
<u>Bank of Palm Beach & Trust Co. v.</u> <u>United States</u> , 476 F. (2) 1343	23
<u>Bingham Trust Co. v. C.I.R.</u> , 326 U.S. 355	24
<u>Bogardus v. Comm'r.</u> , 302 U.S. 34	13
<u>Calurazzo v. Comm'r.</u> , 26 T.C.M. 140	22
<u>Carter Products v. P.C.C.</u> 201 F. (2) 446	64
<u>Cataldo v. Comm'r.</u> , Slip-Op., 72-1595, 2nd Cir.	25-27
<u>C. Doris Pepper</u> , 37 T.C. 886	37
<u>Charles S. Guggenheim</u> , 13 T.C. 81	35
<u>Cohan v. Comm'r.</u> , 39 F. (2) 540	22,40
<u>Duberstein v. Comm'r.</u> , 363 U.S. 276	23
<u>Dunn and McCarthy v. Comm'r.</u> , 39 F. (2) 242, 243, 244	26
<u>Estate of Hibbs</u> , 16 T.C. 535	16
<u>Field v. Truro Cab Corp.</u> , 51 Misc. (2) 976-981	13
<u>Foran v. Comm'r.</u> , 165 F. (2) 705, 706	26
<u>Gompers v. Buck's Stove & Range Co.</u> 221 U.S. 418	55
<u>Hallinan v. U.S.</u> , 182 F. (2) 890, cert. den., 342 U.S. 956, and 343 U.S. 935	56
<u>Helvering v. Taylor</u> , 293 U.S. 507	15

	<u>Page</u>
<u>Herbert v. Comm'r.</u> , 377 F. (2) 65	15
<u>Hull v. Comm'r.</u> , 87 F. (2) 260	16
<u>Hull v. Littauer</u> , 162 N.Y. 569	13
<u>In re Little</u> , 404 U.S. 535	57
<u>In re McConnell</u> , 370 U.S. 230	56
<u>In re Michael</u> , 326 U.S. 224	55
<u>In Ex Parte Hudgings</u> , 249 U.S. 378	63
<u>Johnson v. U.S.</u> , 45 F. Supp. 377	38
<u>King v. U.S.</u> , 18 F. Supp. 242	17
<u>Kotteakos v. United States</u> , 328 U.S. 758	59
<u>LaForge v. Comm'r</u> , 434 F. (2) 370	41
<u>Lutz. C.I.R.</u> , 282 F. (2) 612	26
<u>Maillard v. Lawrence</u> , 57 U.S. 251	24
<u>Marquis v. C.I.R.</u> , 49 T.C. 695	21
<u>McNutt Boyce, Inc.</u> , 38 T.C. 472	47
<u>Munson v. McGinnis</u> , 283 F.(2) 333	24
<u>Northern Natural Gas Company v.</u> <u>O'Malley</u> , 277 F. (2) 128	22
<u>Peckham v. United States</u> , 210 F. (2) 693	59
<u>Randall</u> , 56 T.C. 869	39
<u>Ray Upham</u> , 16 B.T.A. 950	37
<u>Rita McCallinan</u> , T.C. Memo DKT 38626 (1953)	37
<u>Robert B. Williams, Jr.</u> , T.C. Memo 1955-109	39
<u>Rockwood Pottery Company v. Comm'r.</u> , 45 F. (2) 43	13

	<u>Page</u>
<u>Sprinkle v. Davis</u> , 111 F. (2) 925	56
<u>Tauber v. Comm'r.</u> , 24 T.C. 179	16
<u>Taylor v. Helvering</u> , 70 F. 519	15
<u>United States v. Brandt</u> 196 F. (2) 653	60
<u>United States v. United States Gypsum</u> 333 U.S. 364	13
<u>U.S. v. Yates</u> , 107 F. Supp. 412 rev'd 227 F. (2) 848	55
<u>Wallace v. U.S.</u> , 142 F. (2) 240	17
<u>Walsh v. U.S.</u> , 163 F. Supp. 421	16
<u>Weir v. Comm'r.</u> , 283 F. (2) 675	15
<u>Welch v. Helvering</u> , 290 U.S. 111	23, 25, 40
<u>Wener v. C.I.R.</u> , 242 F. (2) 938	13
<u>Woodson v. New York City Housing</u> <u>Authority</u> , 10 N.Y. (2) 30, 32	13

STATUTES, REGULATIONS AND AUTHORITIES

<u>Statutes</u>	<u>Pages</u>
26 U.S.C.A. 162	22,23,24,39
26 U.S.C.A. 212	22,23,24
26 U.S.C.A. 274	39,40
26 U.S.C.A. 274 (c) 7	29
26 U.S.C.A. 274 (d)	40
26 U.S.C.A. 274 (e) (1)	40
26 U.S.C.A. 6212,6213,6501 (a)	17
18 U.S.C.A. 407	55
28 U.S.C.A. 2106,2111	59

<u>Regulations</u>	
1.274-2(b)(2)(viii)	29
1.274-2(c)(6)	29
1.274-2(d)(3)(6)	29
1.274-2(f)(1)	39
1.274-5(a)(3)	40
1.275-5(c)(2)(b)	40
1.274-5(a)(3)	40
1.274-5(c)(3)(iii)(b)	41
1.274-5(c)(5)	40

<u>Rules</u>	
F.R.C.P.	
R.43 (a)	13
R.52 (a)	13

STATUTES, REGULATIONS AND AUTHORITIES

<u>Authorities</u>	<u>Page</u>
34 Am Jr., 2nd, Federal Taxation	
Sections 5821	39
5828	29
5881, 5883, 5890, 5892	41
5901	40
6006	25, 39
6040-6047	33
7103	47
9318	16
 Mertens, The Law of Federal Taxation	
Vol. 9, para. 50.22	17
Vol. 10, para. 58a.35	17
para. 60.01, 60.14, 60.15	16
 17 C.J.S., Contempt, Sec. 2	55

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO and ADA W. CATALDO, :
Plaintiffs - Appellants, : APPELLANTS'
-against- : BRIEF
UNITED STATES OF AMERICA, : 73-2602
DefendantsAppellee. :

1. Were reversible errors made by this trial court:

- a. In disregarding uncontradicted evidence;
- b. In placing the burden of proof upon plaintiff on deductions allowed by the deficiency notice but claimed by defense counsel on trial to be non-deductible;
- c. In refusing the secondary evidence of a lost diary;
- d. In disallowing the deductions claimed by the taxpayers for cash contributions to charities;
- e. In disallowing the business expenses of the lawyer taxpayer in the operation of his law practice.

2. Was the trial of this suit for a refund of income taxes illegally collected conducted in a manner that afforded plaintiffs a fair opportunity to be heard?

3. Was the plaintiff-lawyer, while acting as trial counsel, guilty of a civil or criminal contempt of court or were the many threats of contempt resorted to by the trial court a manifestation of an unlawful interference with the trial procedures aimed at defeating plaintiff's claims?

PRIOR PROCEEDINGS

Plaintiffs, husband and wife, duly filed their income tax return for 1963 showing a taxable income of

\$4488.28 subject to deductions which produced a tax of \$286.34 (Pl. Ex. 1, A358)* which was paid. Plaintiff husband also paid the maximum for social security tax on his net income earned in his profession (f.o.f.30, A82).

In January 1966, the auditing commission, after examining the books and records, issued audit changes seeking additional taxes of \$1794.90. On appeal to the Appellate Division, a notice of deficiency of \$2210.87 was issued on September 22, 1967 (Pl. Ex. 1). This sum plus interest of \$507.62 was paid under protest on the 8th day of February 1968 (A49). Claim for refund of the amount paid was duly filed on the 5th day of June 1968 (A49).

This suit was timely commenced January 31, 1969 (A50).

This court has jurisdiction under 28 U.S.C.A. 1346(a)(1) (A48). The trial was held on 10, 11, and 14 1973 before the Hon. Richard H. Levet. Without a jury, who dismissed the complaint (A87) and also entered an order on May 18, 1973, holding plaintiff Anthony B. Cataldo, who was acting as trial counsel for the defendant and for his wife, for a contempt of court and fined him \$50 (A48). For reasons which hereinafter appear, plaintiffs appeal from the judgment of dismissal and from the order of contempt, seeking a reversal of both and a new trial of

*References are to pages of appendix unless otherwise stated.

tax refund suit before another judge and jury.

FACTS

Plaintiff husband-taxpayer is a practicing lawyer in this city maintaining offices at 111 Broadway, New York, New York (A40).

He prepared his own income tax return. He maintained no separate books of account but he did maintain adequate and accurate records of his financial transactions in the operation of his law office, through the use of his check book. He had only one checking account which was used for both personal and business purposes. The dollar amounts in both categories were small, uncomplicated, and they could easily be distinguished. No objections on this score were raised by the government. However, this fact seemed to be a reason for disagreeing with the taxpayer about the deductibility of items claimed as business expense. This manner of record keeping was invoked with the start of his practice in 1934 and has continued through two audits previous to 1963, each of which ended in no additional tax being found and no objections being raised about the inadequacy of books.

Since 1967, as a result of the audit of the 1963 return, appellant has installed a separate set of books wherein his receipts and disbursements in his practice are kept separate and apart from his check book record of transactions.

There were three audits made of the year 1963 before this notice of deficiency was sent out. These were conducted by an auditor, the appellate conferee and a field auditor. The office auditor stated that he wanted to look at the check book, bank statements and checks and diary. These were left with him. Without conferring with taxpayer, he arrived at an additional tax of \$1749.90 done by the simple process of disallowing business expense items totalling more than \$8000. All income received was admittedly reported in the return. Yet, the type of expenses claimed were the same as taken in previous years and which were allowed on those two previous audits. Deponent appealed.

At the first conference before the Appellate Division, plaintiff explained his records. He had made a summary of the business expenses to which were added a summary of the expenses appearing in his diary. These were figures set down in chronological order as they appeared in the records. The conferee made copies of the same. Then he commenced to question each check. He complained that that process should have been undertaken by the auditor. Taxpayer then offered to employ an accountant to take off the business expenses from his check book. The conferee agreed. An accountant made such a summary showing date, payee and purpose, and when finished, it was handed to the conferee. Later,

the conferee telephoned to ask if the summary could be verified against the actual records. Plaintiff agreed. A third auditor, Levine, then checked the summary against the check book, bank statements, paid checks and the diary. He took off from the records such information as he needed to support his conclusions.

At this point, plaintiff learned that the purpose of this last audit was to support a decision made by the conferee to disallow certain expenses in a most peculiar and arbitrary way. It appears that the taxpayers' list of expenses did not total the same as the accountant's list of expenses in certain categories, although the grand total of the expenses claimed were the same. What the conferee proposed to do was to disallow the greater amount of expenses claimed by the taxpayer in those categories/ ^{where} the accountant's summary was less. At the same time, the conferee would not try to find whether the excess amounts which he would thus disallow could be found under another category of the accountant's summary. Thus, distortion of the expenses was carried over into the deficiency which claims \$1084.57 as disallowed under the category called "services" and \$2292.58 under the category called "case disbursements". The deficiency listed the disallowances in groups of items not under separate items.

During the litigation, plaintiff endeavored to narrow the issues by having defendant state the specific

items in each of the groups of disallowed expenses. He undertook to address a notice to admit, interrogatories and finally he undertook the pre-trial deposition of agent, Levine. The latter identified some items but not all but he admitted that the \$1084.57 and the \$2282.58 did not refer to items but were determined by a calculation of the differences between taxpayer's list of expenses and the accountant's list in the categories mentioned (A14, A15).

The first call of this case for trial was by Judge Duffy. Plaintiff offered but defendant refused to submit each item disputed by the deficiency notice to Judge Duffy's informal finding for the purpose of immediate settlement of the dispute. As in the previous litigational maneuvers, defense counsel refused to list the specific items which they claimed were not deductible. Instead, it insisted upon the generality of claiming the right to a full trial before court and jury. The case was thereafter referred to Judge Levett. At the first call by Judge Levett, the judge asked plaintiff if he would waive a jury. Plaintiff said, "yes, sir." He then turned to defense counsel and asked him the same question and defense counsel, this time, said "yes, sir."

Also, during this session, Judge Levett made a charge of contempt against plaintiff. He ordered plaintiff to remain quiet while he asked defense counsel about

plaintiff's case. The judge then used some choice words to describe his dislike to having a lawyer try his own case. Nevertheless, plaintiff did manage to explain that if the government would break down the amounts of the disallowed expense in the deficiency into specific items, a settlement might be reached. The judge then ordered plaintiff to set out a list of the expenses he would claim and he ordered defendant to respond by marking those items only which would be objected to, by the letter D for disallowed. The plaintiff set out his list of claimed expenses, dated March 12, 1973. This list was a reduced list, made in the hope of a settlement. The defendant, however, gave several versions of which of the items in plaintiff's list were disallowed. Included in such versions were admissions made known in the discovery proceedings. There were five versions. The first version was that testified to by agent Levine in his pre-trial deposition and in the answers to interrogatories. The second version was a volunteered statement where Ds were marked on a list of claimed expenses furnished by plaintiff prior to March 12, 1973. The third version was the statement required of defendant by Judge Levett in which defendant marked a D alongside of each item it disallowed in the list of March 12, 1973 of the plaintiff. The fourth was a later volunteered list of Ds marked on plaintiff's list increasing them materially.

The fifth version is included in a series of letters by defense counsel dated April 3, 10, and 17, 1973, made after a re-examination of plaintiff's books. These letters came about by the fact that defense counsel had promised that he might admit the deductibility of some of the new items to which his last objections referred, if he could re-check plaintiff's books. That was permitted to him which resulted in the letters mentioned.

For the trial, plaintiff prepared two lists of business expenses each containing the same items (A315-A316); (Pl. Exs. 24 and 25 for id.) Both were copies of the March 12, 1973 list mentioned above. However, one contained the admissions that had been made by the defendant as to deductibility. In this list the expense item is not stated in full but is stated by its number appearing in the other list. The non-admitted items are thus made clear. They totaled \$3614.32. These lists were filed with the court two days before the commencement of that trial(A316).

The defense counsel prepared, as an addendum to defendant's trial memorandum a list of expenses deemed not deductible, regardless of whether they had been allowed by the deficiency or had been admitted as deductible in any of the five versions mentioned above. This list is finding of fact No. 9. Said list claimed

as non-deductible, items of expense not ever questioned before trial. It was filed at trial time. The court directed plaintiff not to follow his own order of proof but to give testimony on each items claimed disallowed by defendant's brief(A104-A109). This order of the court prevented plaintiff from explaining the method of the conduct of his business, that the deficiency and hence, the assessment, was inaccurate and arbitrary, and, that he was obliged to rely upon secondary evidence of the contents of his diary for 1963 which he had lost.

The foregoing facts when not supported by a citation to the record appear in the affidavit reproduced in the appendix (A12-A43) on plaintiff's motion for permission to make offers of proof as permitted by the court at A354. Despite the court's promise to await the submission of briefs to decide the issues (A355), the court made its decision denying the offers on June 13, 1973 (A39) while the brief was submitted on June 21, 1973 (A42). Its decisions, A34-A39, A43, attest to the arbitrary refusal to hear the evidence.

POINT I

THE COURT BELOW ERRED IN CALCULATING THE NET INCOME.

There is no dispute about the fact that the total income of the parties was properly reported. The only

dispute raised by either the deficiency notice or by defense attorney related to the business deductions taken under schedule C or the personal deductions for charities and sales taxes. The court below allowed the sales taxes, but disallowed the contributions claimed in toto; see finding 25(A-80). They amounted to \$542. (Pl. Ex. 1, p. 5). Under Schedule C of the return, the lawyer-plaintiff reported his earnings from the operation of his law office. His gross income was \$29,750.58 (Pl. Ex. 1, p. 5). The total business deductions claimed were \$25,246.75.

The court found as profit on the gross of \$29,750.58, the sum of \$17,658.07 (f. of f. 22) leaving allowed expenses of \$12,092.51, (f. of f. 23). While the arithmetic is correct, yet getting into the specifics of the deductions, it is found that as compared to the allowed figure of \$12,092.51 in f. of f. 22, the court noted in finding No. 6, that defendant admitted \$12,475.87 of expenses. To these admissions must be added those amounts from the list of contested items which the court allowed. These allowances are enumerated in findings 10, 11, 14 and 16, and total \$1516.84. These two unassailable figures total \$13,992.71. Hence, the figure of \$12,092.51 is clearly erroneous.

But finding No. 8 has no support in the record. No evidence was adduced and none is in the record which says that the total business expenses were \$10,575.69 as is stated in said finding (A58). The only evidence on what the total

business expenses were is that the re \$25,246.75 (Pl. Ex. 1 and Pl. Ex. 2). The court obviously placed this figure at \$25,251.75 in its decision (A6). The said exhibits are the return and the deficiency determination. Defendant offered no objections to its admission into evidence.

The deficiency determination disallowed \$9503.72 of such business expenses. Defendant's objections included in its list handed to the court at the trial disallowed \$8439.07(A65). At the trial, defendant claimed that \$2181.72(A63) should be transferred to personal deduction. This would total \$10,620.79. So, at the trial, the court disagreed with defendant and disallowed \$16.84 of its claims to disallowances. Subtracting this from the total claimed of \$10,620.79 leaves only \$9103.95, not \$17,658.02 of finding No. 22(A79). Accordingly, findings No. 22 and No. 23 are clearly erroneous.

Actually, the only matters tried were the contested items according to defendant's list. This is what the trial judge ordered. The trial was devoted to those items. The court prohibited examination of other areas of pertinent facts, such as the method employed by plaintiff in the acquisition and performance of his business, the inaccuracies existing in the deficiency determination of items objected to and the fact that defendant's deficiency determination included items already allowed by the deficiency determination.

A 491

or were admitted to be allowable in pre-trial discovery proceedings.

In fact, at A 47, the court states in its decision, that (a) 141 items of contested business expenses were tried at its direction and (b) that it permitted plaintiff to submit his offer of proof of additional matters in writing after trial.

POINT II

THE COURT'S INSISTENCE UPON AN UNSPECIFIED FORM OF CORROBORATION IN RESPECT OF PLAINTIFF'S CLAIMS WAS UNLAWFUL

The honorable court below in making this disallowance failed to weigh the testimony of the taxpayer as proof of deductibility but disallowed it because there was an alleged lack of corroboration; see finding 12(A66); finding 13(A67); finding 15(A69-A70); finding 17(A72); finding (A74); finding 19(A77); and finding 25(A80). The transcript will show more of these examples. In its decision, it relied upon the rule of placing the burden of proof of deductibility upon plaintiff irrespective of whether the disallowance was one included in the assessment or were newly made by defense counsel at trial, and this, it said, justified the disallowance. What the honorable trial court really did was to abrogate the old rule that a party in interest is a competent witness and that uncontradicted evidence which is normal and reasonable is conclusive upon the court, even if it is the party's testimony.

This rule is not only the well established rule in New York, see Hull v. Littauer, 162 N.Y. 569; Field v. Truro Cab Corp., 51 Misc. 2, 976-981 and Woodson v. New York City Housing Authority, 10 N.Y. 2d 30, 32. The rule is the same in the Federal courts; see Bogardus v. Comm'r., 302 U.S. 34; Wener v. C.I.R., 242 F. (2) 938; Rockwood Pottery Company v. Comm'r., 45 F. (2) 43. See the dissenting opinion of Judge McAllister in Ballou v. U.S., 370 F. (2) 659, at 664-678, cert. den. 388 U.S. 911. Rule 43(a) F.R.C.P. permits the federal trial court to apply the rule of evidence of the State where it is situated.

Furthermore, Rule 52(a) F.R.C.P. states that findings of fact of a district court may be set aside if clearly erroneous. Our Supreme Court stated in United States v. United States Gypsum Co., 333 U.S. 364, 395 gives an appellate court power to set aside the finding of a fact if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Supreme Court then proceeded to weigh the record evidence and it set aside the findings as being unsupported. In the case at bar, a reading of the entire record will show a hurried conclusion to disallowance despite evidence of a business oriented expense rather than a weighing of the facts on hand. The specific disallowances will be discussed infra.

POINT III

THE BURDEN OF PROOF WAS MISAPPLIED
AS TO THOSE ITEMS WHICH DEFENSE
COUNSEL ADDED TO THE DISALLOWANCES
OF THE ASSESSMENT AND TO THE
INACCURACIES OF THE DISALLOWANCES
BY THE DEFICIENCY.

The court below stated emphatically the usual rule that the burden of proving the correct tax is on taxpayer and that there is a presumption that the assessment is correct. However, it has said nothing of what happens when the assessment is proven incorrect and arbitrary or when the government changes the disallowances just before trial. Where is the burden of proof in the latter two situations?

Plaintiff argued strenuously below that where the assessment is shown to be arbitrary, the presumption of correctness falls and plaintiff no longer has to overcome the presumption. Its proof of normal and ordinary expenses if uncontradicted is conclusive. At least, if it submits proof of a prima facie nature, the burden of going forward is upon the defendant and absent any proof by defendant of a contradictory nature, defendant and not plaintiff is the one who has failed in the proof. The rule is the same where the government claims more items to be deductible than shown in the assessment. The theory is that the assessment draws the issues and any new reasons for increasing the tax is a

new issue.

As the deficiency alleges a total of \$10,054.88 to be disallowed, obviously it was erroneous when compared to the disallowance of \$8439.07(A65) stated by defendant in its trial brief. There were at least two items identified by Agent Levine which proved the arbitrariness of the deficiency notice. This is the item of disallowance of \$1084.57 for services which is found at page 2 of the deficiency and the other is the item of \$2282.58 for case disbursements which is found on the same page 2. In the offers of proof made at the trial with the Court's permission at pages 3 and 4, these items are explained as not related to expense claimed, but are arbitrary calculations. The pages in the examination before trial of Levine where the admissions could be found are stated at pp. A14, A15, A32.

Consequently, having proven the deficiency, at least, offered proof of it, the burden of proof really shifted to defendant once plaintiff testified to the business character of the items spent. See Taylor v. Comm'r., 70 F. (2) 619, aff'd sub nom Helvering v. Taylor, 293 U.S. 507; Weir v. Comm'r., 283 F. (2) 675; Herbert v. C.I.R., 377 F. (2) 65 and Baird v. C.I.R., 438 F. (2) 490. The late Judge Hand, L., stated in Taylor v. Comm'r., supra, how this rule is applied to a tax refund suit. In this case, plaintiff either proved inaccuracies in the deficiency notice or he was directed by the court not to make the proof which direction at times

was accompanied by threats of contempt. Nevertheless, there is enough evidence to show the correct tax. If the disallowances claimed by defendant were to be lawfully determined, the total could be subtracted from the \$25,246.75 to find the actual expenses to be deducted from the gross receipts.

Where the disallowances claimed at the trial are new, the defendant has the burden of proving the new matter raised. The assessment is said to have admitted the propriety of the items not disallowed. See Walsh v. U.S., 163 F. Supp. 421, 425; Hull v. Comm'r., 87 F. (2) 260, 261; Estate of Hibbs, 16 T.C. 535; Tauber v. Comm'r., 24 T.C. 179 and cases cited. Estoppel would operate against the proposing of new claims to disallowances; see 10 Mertens, paragraph 60.02, 60.14 and 60.15. In this case, the new disallowances were advanced on the eve of trial in 1973. There was no amendment of defendant's answer. It was just a claim advanced by defendant in its trial brief. Even so, if they were treated as pleadings, so that they could be dealt with on the trial, the burden of proof would still be on the defendant, See 34 Am. Jur. 2nd, Federal Taxation, Section 9318, where Am. Jur. says:

"Burden of proof is distinct and apart from the presumption that the deficiency is correct. ...In the unusual case where the Commissioner has the burden of proof, the presumption that the deficiency is correct doesn't satisfy that burden. The Commissioner must still prove his case. If neither the Commissioner nor the taxpayer submits any evidence in such a case, the tax court will decide the case against

A 490

the Commissioner (citing Reis 1 T.C. 9, aff'd 142 F. (2) 900). The Commissioner has the burden of proof with respect to issues first raised in his answer (citing T.C. Rule 32; Buhler, T.C. Memo, 1970-151; and Rickey, 54 T.C. 690)."

See also 10 Mertens, paragraph 58(a) 35; see also 9 Mertens under par. 50.22 at page 62 and the cases and comments made under Note 81. Mertens also states that an increase in amounts disallowed at trial may not be permitted if the Statute of Limitations has run. Here the Statute had run out on December 31, 1967.

Indeed, how could the Statute of Limitations operate against the Government if a claim for refund could be used to re-litigate matters of a year that has been closed by the Statute? See Sections 6212, 6213 and 6501(a) of Title 26 U.S.C.A. Of course, the Government is in no different position in a tax refund suit than any private litigant. See King v. U.S., 18 F. Supp. 242, and Wallace v. U.S., 142 F.(2) 240. Under this heading, not only did the Court fail to acknowledge the existence of this rule of law in deciding against taxpayers on specific items for an alleged lack of sufficient evidence but also it did not even want to recognize this rule and refused the proofs of the testimony of Agent Levine and insisted upon the plaintiff proceeding with the court's own views of how the case was to be tried. See A89, A93-A109, A112-A119, A122, A126, A128, A136-A138, A156, A158, A161, A162, A212, A213, A214, A312-A314, A319, A320,

A322, A323, A336-A351.

The new disallowances were not made known by defendant until after it had learned that plaintiff could not find his diary which fact was made known at the first conference before the trial judge. The third list of items marked with a capital letter "D" by defendant was the first such claim. This was late in March 1973. Fully nine years after the return had been filed and when plaintiff's memory of events had ~~so~~ dimmed that he could not recall the names of people entertained at the Bankers Club, yet there were those chits showing lunches for two, three or four. Nor could he recall the purposes of the patty cash items in Pl. Ex. 29 for id.

Comparing Mr. Levine's deposition of what items were listed in the deficiency notice as disallowed to defendant's claim to items disallowed according to its list handed up at the trial, the following 19 items totalling \$2540.16 are newly claimed items:

Mar. 15	Italy-American Chamber of Commerce, dues	\$ 100.00
Mar. 19	J. Marquet Studio, Services	63.50
Mar. 24	Fordham Law Alumni, cost of dinners	482.15
Apr. 7	Maritime Law Assn., two dinner tickets	30.00
May 22	Surrogate's Court, Clerk's fees	25.00
June 5	Banker's Club, dues	271.08

June 15	Raines & Gutman, Settlement of claim against client	225.00
June 21	Cash for attending Maritime Law dinner	75.00
June 26	National Surety Corp., costs paid pursuant to guarantee	867.67
July 22	J. Brown, services	35.00
July 23	Atlantic Beach Club, chits for party	72.50
July 3	Surrogate's Court, fees	20.00
Aug. 7	Bankers Club, chits for lunch	22.76
Aug. 12	Cash, money used for trip to Washington	50.00
Oct. 17	Men's Club of Forest Hills, dues	10.00
Oct. 28	Italy-America Chamber of Commerce, dinner tickets	50.00
Oct. 30	Women's Club of Forest Hills, dues	22.00
Nov. 8	West Side Tennis Club, chit for dinner with guest	8.00
Dec. 9	Check to cash to payment for client	<u>100.00</u>
	TOTAL	<u><u>\$2540.16</u></u>

Each of the foregoing items were payments by check, for purposes mentioned and each had been allowed in the deficiency notice. These items were included by defendant in its list of disallowed items without explanation, and without disclosure of the fact that they were new disallowances.

The court treated all disallowances listed by defendant as though they had been disallowed by the deficiency determination. It failed to distinguish between the new and the old. A reading of its decision proves this statement because no items are distinguished between new and old claimed disallowances. The court failed to apply the burden of proof as hereinabove stated. Instead, it placed the whole burden of proof on plaintiff to prove its entitlement to the deduction except the items of March 19, April 7, May 22, July 3 and August 12 which total \$188.50 (A71).

POINT IV

CONTRIBUTIONS WERE ERRONEOUSLY HANDLED BY THE COURT BELOW.

Plaintiff claimed \$333. of contributions as business expenses. They were all paid by check. Additionally, plaintiffs claimed \$542. of contributions paid in cash to named charities. These latter were deducted as Sec. 170 contributions under itemized deductions. The court allowed \$306. of the check contributions(A78) but transferred them out of business expense to personal expense(A79). The court failed to include a \$10. check to the Church-in-the Gardens and it disallowed an \$18. payment to Shakespeare Festival. Taxpayers were willing to concede the latter; see their brief after trial Document 60 of the Record. The

transfer out of business expense was placed upon the erroneous claim of the defendant that Sec. 162(b) disallows contribution as business expense. This disallowance mentioned refers only to contribution taken as Section 170 contributions. That contributions may, instead, be considered business expense; see 1963 Reg. 1.162-15(b). See also, Marquis v. C.I.R., 49 T.C. 695 where contributions were permitted as business expense when they were made for encouraging new business. Plaintiff made the check contributions to the charities named whenever a client or prospective client headed a drive or was acting as a solicitor of the charity. He made the cash contribution in the ordinary manner, e.g., going to church the wife to Protestant churches, the husband to Catholic church; contributing to door collectors appointed to collect for charities in the apartment where plaintiffs lived; to the occasional \$1 or \$2 in cash put in the mail to appealing charities. Yet, all cash contributions were disallowed (A78, A323-325, A329, A332-A336). The fact that evidence of the payment of these cash contributions was uncontradicted and were in a way corroborated by the plain evidence of plaintiff's responsiveness to appeals for charitable purpose as evidenced by their check payments and the further fact that none of the cash contributions are duplicated by checks and vice-versa and yet church-going was a customary way of

life for taxpayer, all, nevertheless, went unheeded. The reason appeared to be a so-called failure to corroborate in a way not expressed by the court or the defendant. In appellants' view, the disallowances were clearly erroneous as an effort should have been made by the court to find the taxpayer's contributions. See, Calurazzo v. Comm'r., 26 T.C.M. 140, where the tax court made such an effort. The same problem of finding a reasonable amount is raised where a depreciation deduction would be permissible. It cannot be denied. To do so would be to transgress the statute. See Northern Natural Gas Company v. O'Malley, 277 F. (2) 128. The court in Northern Natural Gas Company cites Cohan v. Comm'r., 39 F. (2) 540, which was a case allowing reasonable expenses to be estimated when the expenses were paid but a record of them was not reasonably possible. Also, the Northern National Gas Company case restates the rule that a regulation that is out of harmony with the statute is a nullity. See p. 134.

The foregoing legal errors stamp the action of the court below as clearly erroneous.

POINT V

A BUSINESS EXPENSE IS AN ORDINARY AND NECESSARY EXPENSE INCURRED IN THE BUSINESS OF THE TAXPAYER, A FACTOR IGNORED BY THE COURT BELOW.

An individual businessman may deduct business expenses either under Section 162 or 212 of I.R.C. Section

162 simply states that "all the ordinary and necessary expenses...in carrying on any trade or profession shall be deductible." Section 212 just as simply says:

"All the ordinary and necessary expenses paid...

(a) for the production or the collection of income"

are deductible.

Neither of the sections condition the deduction upon the maintenance of any books or records nor do they give the Internal Revenue Service the power to determine what is ordinary and necessary. If anything, the taxpayer is given the option to determine what in his judgment is ordinary and necessary for his business. Cardoza J. said in Welch v. Helvering, 290 U.S. 111, 115, in discussing "ordinary and necessary" expenses for business said: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the Statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."

Where an item of expense (gift) had as its dominant motivation a business need, the item was deductible, see Bank of Palm Beach & Trust Co. v. United States, 476 F. (2) 1343, 1346. Two gifts cases were examined by the Supreme Court in Duberstein v. Comm'r., 363 U.S. 276, 286, and the Court said that the dominant purpose of the expenditure rules the nature of the act and the intent of the taxpayer.

Popular meanings of words apply to the tax laws said the court in Maillard v. Lawrence, 57 U.S. 251; and in International v. C.I.R., 275 F. (2) 578, the court said that they should be broadly construed to facilitate business. Otherwise, the ingenuity and inventiveness of businessmen would be stultified if they thought they could be second-guessed by an Internal Revenue agent whose interest would lie in disallowing deductions to increase the tax. The court below was at pains in its decision to state that deductions are a "matter of legislative claims." Then, without authority, it states that Section 162 allows only "certain" ordinary and necessary expenses. It makes this statement to justify its holding that "it is incumbent upon the taxpayers to justify the allowance of each deduction claimed." Section 162 is misquoted and its effects are misinterpreted. As noted above, Section 162 permits "all" ordinary and necessary expenses just as 212 states that "all" the ordinary and necessary expenses are deductible. Both sections are in pari materia, See Bingham Trust Co. v. C.I.R., 326 U.S. 365 and Munson v. McGinnis, 283 F. (2) 333. The court does not and cannot quote any case which permits the Internal Revenue Department to determine that an item may be disallowed even though the businessman spends the money in the effort to produce income in his profession. The court also said in its decision on plaintiffs' motion to be permitted to make certain offers of

proof that the text is an objective one. It is not a subjective act of the taxpayer. It cites Cataldo v. Comm'r., Slip Op., 72-1595 (2nd Cir. Mar. 27, 1973). That case did not so hold nor was it the intent of this court to overrule the established principle that it is the businessman's own intent in making the expenditure that counts to determine whether it is a business expense. Section 6006 of 34 Am. Jur. 2nd states that the concept of what is ordinary and necessary is a flexible one. It might be an extraordinary one under certain circumstances and an absolute and essential one under others. A necessary expense has been defined as one which is appropriate and helpful in developing and maintaining the taxpayer's business. It need not be essential or indispensable. Usually, the taxpayer's judgment as to what is necessary will be accepted by the court. Am. Jur. Cites Welch v. Helvering, supra, for this last proposition. Also, in the same section 6006, Am. Jr. says:

"...does not bar a deduction merely because the expense is not one incurred by competitors of the taxpayer. To bar the deduction would impose a tax penalty on business ingenuity. (Poletti v. C.I.R., 330 2d 818)."

The court below disregarded the claims to business deductions just because defendant insisted on requiring corroboration of the taxpayer's uncontradicted business purpose of the expenditure. It also disregarded the corroboration of the surrounding circumstances and normal business reasons for making the expenditure. The kind of

corroboration required by defendant and the court was never expressed but nevertheless it was used to deny deductibility. Yet in Foran v. Comm'r., 165 F.(2) 705,706, the court said that here is direct proof of the taxpayer's intent. His testimony is consistent with every proven fact. He gives credible reasons for it. To refuse to follow it is to act contrary to law. At page 707 the court said:

"We recognize that intent may be proved by circumstances, and that a party's testimony as to his intent may be rebutted by proof of circumstances which are inconsistent therewith. We hold that no circumstances shown by the Tax Court here is inconsistent with the reasonable and uncontradicted testimony of Foran."

As best as plaintiff can group the disallowed expense they are as follows:

Raines & Gutman	\$225.00
<u>National Surety Corp.</u>	<u>867.67</u>

Both payments were made by check as an integral part of plaintiff's professional employment by his client. See Lutz v. C.I.R., 282 F.(2) 612, and Dunn and McCarthy v. Comm'r., 39 F. (2) 242,243,244. These checks were paid to creditors of a client named Gustavsson, a general contractor who operated two separate corporations, one named Ove Gustavsson Contracting Corp., and the other G.O. General Contracting Corp. In 1963 only G.O. General was operating. It owed money to an equipment supplier named Flaherty and it was sued and a settlement was reached for \$225. This corporation had no cash money, but it had a great deal of equipment and was fully organized to perform contracts if it could

qualify for surety bonds. There were no judgments outstanding against it. Plaintiff paid the costs of the case and the¹ settlement monies and expected to bill these charges as disbursements in the case along with a small fee for handling it. Plaintiff's usual method of handling disbursements was to deduct them when incurred and if they were reimbursed, they would be reported as income. See the Slip Op. in Cataldo v. Comm'r., supra. Nevertheless, the court below disallowed the the \$225(A72). Plaintiffs' testimony was reasonable and it was uncontradicted.

Similarly, the \$867.67 to National Surety Corp. was to pay the judgment incurred by an obligee on some cost bonds furnished by National Surety Corporation for Ove Gustavsson Contracting Corp. Plaintiff had guaranteed the company against loss. Plaintiff paid and had expected to bill this company for reimbursement of this expense plus a fee. This company had a large claim against the United States for extras arising from its last job. Upon its collection, it would be in business again. As events turned out, neither company ever qualified and both ceased to exist sometime later. Neither payment was ever recouped. In fact, plaintiff sued Ove Gustavsson Contracting Corp. in Supreme Court, New York County and recovered a judgment. On the inquest to fix the amount plaintiff had prepared an affidavit for the court to show the actual expenditures

in the National Surety Corp. litigations were in excess of \$1400. A copy was offered and marked Pl. Ex. 26. The costs allocated to Brown & Bryan refer to the costs incurred in the National Surety Corp. matter. Yet, the court disallowed this \$867.67(A72). Both are clearly business expenses and ordinary. The fact that some lawyers would not have extended the credit to Gustavsson as plaintiff had done is beside the point. Plaintiff had expected great things from Gustavsson. They failed to materialize. But the business character of the expense was present. Clearly it was error to disallow them.

THE \$100. RENT CHECK

In December, plaintiff cashed a check to cash for \$100. and paid the proceeds to the Clerk of the Civil Court in Queens in a dispossess proceeding as the rent due from one Valerie Lewis, a client. The \$100. was repaid with an additional small sum for a fee in 1964. The whole receipt was reported in plaintiff's 1964 return. These facts were explained to the three auditors who looked at plaintiff's books before the deficiency and in the case of Agent Levine, the taxpayer's copy of the 1964 return with the work papers were shown to him. An affidavit prepared for the conferee at the Appellate Division also explained the payment, the receipt

of the larger amount and its report in the next year. This affidavit was marked Pl. Ex. 16 for id. Yet, the court disallowed the deduction though it had been allowed by the deficiency notice. Here was a case of refusing to accept uncontradicted evidence of a reasonable sort.

THE PAYMENTS TO ITALY-AMERICA
CHAMBER OF COMMERCE

There were three checks to this Chamber of Commerce, dues of \$100; a ticket for a luncheon for \$12.50 and two tickets to a dinner for \$50. All were disallowed. Plaintiff explained that this was an organization from which he had gotten business and that he had expressly joined it and attended its functions for the purpose of enhancing his business. This testimony was uncontradicted. Somehow, it seemed odd to defense counsel that a lawyer should join a trade association and the court disallowed the items. Yet, these are expressly allowed; see 34 Am. Jur. 2nd, Federal Taxation, Section 5828, Reg. 1.274-2(b)(2)(VII); 1.274-2(c)(6); and 1.274-2(d)(3)(6). The statute 274(c)7 allows the tickets. It matters not that some expense is a business and not strictly a professional expense. The return requires all business expense to be reported in Schedule C no matter how many businesses the taxpayer is in. Here, again, is clear error.

PETTY CASH DISBURSEMENTS

Plaintiff claimed that he had incurred \$3881.78 for petty cash expended, all of which were noted in his diary. The deficiency notice allowed \$2230.23 and disallowed \$1593.55. The explanation for the disallowance was that each item disallowed was for \$25. or more (A293-A297). Plaintiff testified that the expenses were for supplies delivered c.o.d., stamps, local travel charges, fees to courts paid in cash, tips, some lunches for the girls in the office and some luncheons with clients at restaurants (A301, A302, A303).

Just before the trial, plaintiff discovered that he could not find the diary (A17-A18, A269). It was probably lost in June 1972 when plaintiff moved his offices. As a result of that moving, plaintiff found other records missing. The court would not allow secondary evidence of the diary. Plaintiff wanted to lay a basis for secondary evidence. The court refused the proof and the offers of proof. See his orders of June 13, 1973 (A34, et seq.) and June 26, 1973 (A43). Plaintiff had transferred the amounts of the items appearing in his diary to yellow sheets of paper in 1964 when he prepared his return (A270-A273). He had shown the diary to all three auditors (A19, A308). He had given his list on yellow paper to the Appellate

Division conferees(A289,A290,A291). In preparation for the trial he had caused a subpoena to be served upon Levine to produce whatever notations had been made by either auditor of the diary notations(A30-A31). He tried to get these documents into the record but the court would not let them in(A277-A288). Levine was called by the court (A273). Levine's testimony goes to A308, but every time plaintiff wanted to adduce evidence, the court, on its own motion, acted to disallow it. [The witness committed perjury by saying that he had not seen the diary instead he had seen the yellow pages marked Exhibit 29; (the court refused to admit Ex. 29(A297). Yet, on the deposition he had testified that he had seen the diary and defense attorney had even questioned him about the diary during that deposition (A16-A20, A32).

At page 111 of the deposition (Document 34 of District Court Record) defense counsel, Mr. Reilly, questioned Mr. Levine as follows:

"By Mr. Reilly...

Q. Did Mr. Cataldo show you a lawyer's diary for the year 1963 in connection with certain business expenses?

A. Yes.

Q. Were you allowed to retain that?

A. No.

Q. Was taken back from you?

A. It was never - it was part of his books and records not intended to be taken by me, although I did abstract tapes of the total diary expenses indicated."

Plaintiff offered Exhibit 29 as a substitute for the diary but that was refused. Plaintiff's requests for the production of the government's notes of the diary were likewise refused. Then plaintiff offered to read and he placed in evidence his interrogatories to defendant regarding the diary entries and defendant's responses which were to the effect that \$2230.23 were allowed and \$1593.75 were disallowed; see Pl. Ex. 30. Yet, the trial court disallowed even the \$2230.23 that had been conceded by the defendant.

Here was clear proof of the trial judge entering the case, helping counsel for defendant to keep out evidence that was lawful and should have been allowed into the record. The disallowance is not only contrary to the uncontradicted facts and has no support for it, but also the refusal of the evidence was legal error.

EXPENSE OF DOING BUSINESS AT HOME

The lawyer taxpayer used his apartment residence to handle the affairs of clients. He had taken as a business deduction one-half of his home rent, electric and gas bills, and telephone. The deficiency had cut the one-half to one-fourth. The law seems to be that a lawyer who uses

his residence in his business is entitled to a deduction of an amount reasonably allocated to the use of the residence in the business. See 34 Am Jur. 2nd, Federal Taxation, sections 6040-6047 incl. Included are rent, heat, light, insurance, painting, repairs, upkeep of lawn, etc.

Plaintiff's claim to one-half was based upon the fact that his business from his neighbors had increased to more than one-half of his gross as compared to previous years. The cut to 20% by the I.R.S. was based upon the fact that as the apartment was a five-room apartment, one room would be allowed.

The evidence appears at A122. The proceedings showed the evidence was limited by the trial judge to a statement of plaintiff's claim and upon hearing that, the trial court said 25% would be allowed. When plaintiff tried to testify to the reasons for his claim to one-half the trial court refused to allow him to say anything more on the subject. This is the way he dealt with the first month's rent of \$178.41. Thereafter, the court allowed one-quarter for the rent and the electricity but he disallowed the gas bills altogether. The defendant conceded one-half of the telephone bills.

In plaintiff's written offer of proof and in his brief after trial, the facts regarding how much use was made of the apartment are expanded upon but the court refused their admission. These facts would show that the apartment was

used not only to confer with clients and their matters, in person and over the telephone, but also that writings and documents were prepared, that a typewriter and a full supply of legal papers and letterheads were kept at the apartment and letters and legal documents would be prepared there, whether they related to the business of neighbors or to the business of non-neighbor clients. Also, plaintiff would entertain at home and use every facility of the apartment in that effort. It is respectfully submitted that the honorable trial court acted arbitrarily in reducing the claim and in refusing the evidence of the plaintiff's use of the apartment in support of his claim.

SEVEN MISCELLANEOUS ITEMS THAT
WERE IMPROPERLY DISALLOWED AS
BUSINESS EXPENSES

In finding of fact 15, (A69,A70) the court disallowed the following five items. Why?

a. Nussbaum's Liquor Store, a check for \$24.82, for liquor in the office. This is the only charge for this purpose for the year. Why it was disallowed is not explained. Liquor was usually kept in the office for clients' use(A205,A206).

b. Tiro A. Segno, for \$43.50, a check to a restaurant where plaintiff entertained five elderly ladies from Forest Hills. The restaurant was unique and served superb food. The taxpayer had performed legal services for

all five of them at one time or another and wanted to entertain them. This evidence, too, was uncontradicted. The check was corroborated; see Reg. 1-274-5(c)(iii)(6). Divided five ways the \$43.50 was less than the \$25. for each person which figure does not require corroboration by records. Taxpayer's evidence that he entertained them for business reasons should not have been disregarded.

c. Fordham Law Alumni for a class reunion dinner. The sum of \$300. had been collected in advance. The claim of expense was for \$182., the excess over the collection(A177). Through some misunderstanding \$482. was disallowed. Instead, the \$182. should have been allowed. This was not a personal expense.

d. A check for \$75. to cash drawn by the taxpayer so that he might have cash funds to spend at a Maritime Law Dinner. He testified that he spent the funds there(A193). There was no contradiction but the court disallowed it.

e. A check for \$50. to cash was at A72 disallowed by the court. The check for cash was used by the lawyer-taxpayer on a golf date with three clients. The names of the three and their business relationship was testified by plaintiff(A212). The event occurred in August. It was the only claim for cash for entertaining clients made by the taxpayer. Taxpayer agreed to the engagement only because of the business connection he had with the parties. Yet, it was disallowed.

In finding of fact No. 17(A72) there is the disallowance of a check to J.T. Thomassen for \$36.45. It was to pay for some services performed for the lawyer taxpayer at his New York office but at the time of trial he could not produce the check. The check had been shown to the three auditors, and to defense counsel. It had been handled by defendant at least four or five times. But when it could not be found in its rightful place within the bank's envelope at trial time, the court disallowed it for that reason.

There is also a disallowance of a \$50. check to cash dated August 15, but this is a duplication of the same disallowance (A70) discussed above.

CLUB DUES AND EXPENSES OF
ENTERTAINMENT

Plaintiff-lawyer was a member of the Bankers Club, a luncheon club at 120 Broadway, in Manhattan. He also was a member of the West Side Tennis Club of Forest Hills and of the Atlantic Beach Club of Atlantic Beach, New York. He claimed the dues from each and the chits for entertaining client's as business expenses. The defendant's brief allowed the dues for the Bankers Club but not for the other two. All chits seem to have been disallowed but for two (f. of f. A68). Yet it is the settled rule that a lawyer's expense at entertaining a client at lunch is deductible; see Charles S. Guggenheim, 18 T.C. 81.

A lawyer's entertainment expenses in connection with his practice is an allowable business expense. While Section 162 does not expressly so provide, the generality of its provisions would include entertainment expenses for lawyers' clients and prospective clients because it says that all ordinary and necessary expenses were deductible. The tax court in the following case had some very interesting down-to-earth observations to make about this: It said: "It is true that the practice of law comes the closest to describing petitioner's trade or business; yet, nowhere in the code, regulations or decided cases is there authority for stereotyping the profession. There is more to the modern day practice of law than just reading cases, writing briefs, and appearing in trials. There are many things that are not in the purest sense the practice of law. Nevertheless, they are so integrally connected with it as to be inseparable from it. Certainly, this (entertainment) is not what one would ordinarily think of as a practice of law, yet there is little doubt that it may be an ordinary and necessary business expense which arises out of his trade or profession; see C. Doris H. Pepper, 37 T.C. 886."

A lawyer's cost of attending a professional meeting, convention or conference may be deductible as an ordinary or necessary business expense; see Rita McCallinan, T.C. Memo, DKT 38626 (1953); and Ray Upham, 16 B.T.A. 950.

Dues paid by lawyers to social and athletic clubs, and expenses of entertaining prospective and actual clients therein are deductible if the taxpayer can substantiate that the amounts paid were for business purposes and not for social reasons. In Johnson v. United States, 45 F. Supp. 377, the court overruled the commissioner and held that the amount for dues and expenses were allowable as business deductions. The plaintiff and his partner were the only members of their law partnership. Both of them joined golf clubs and both used them to secure new clients. The court elaborated as follows:

"The facts disclose that the main purpose of the plaintiff in joining the clubs was to obtain business, and the plaintiff gave many names of clients secured by his partner and himself in this manner. Large fees were collected from contacts made at the club."

In view of the income taxes paid on the fees collected, the court said that the government cannot refuse a business deduction for the expense which had produced the business. The court said, "To rule otherwise would revive the fable of the goose and the golden egg."

If expenditures by a lawyer for membership in social clubs, civic organizations, Bar Associations, veterans' and other like organization, including traveling expenses to attend meetings are made for the purpose of maintaining and increasing his practice, such disbursements

are deductible as business expenses. This was specifically so held in Robert B. Williams Jr., T.C. Memo, 1955-109. The court further observed that "it is clear that to the extent the expenditures were made for the purpose of maintaining and increasing his practice, and were reasonably calculated to accomplish that end he is entitled to a deduction for an ordinary and business expense. Such practices are hardly novel or unusual, particularly in those professions in which soliciting or advertising are forbidden by ethical concepts."

Where entertainment expense is deductible as an ordinary and necessary expense of the business operated they are not subject to the restrictions imposed on other entertainment expenses by Section 274; see 34 Am Jr., 2nd, Section 5821; Sec. 274(e); Regulations, Sec. 1.274-2(f)(1). So long as the primary purpose of the taxpayer in providing the meal or drinks is to further his trade or business and is not social or personal, the expense will be deductible under Section 162; see Randall, 56 T.C. 869. It would not be essential that business be discussed at the time of the meal or drinks. Section 6006 of 34 Am. Jur., 2nd, states that the concept of what is ordinary and necessary for a business expense to be deductible is a flexible one. It might be an eccentric one under certain circumstances and an absolute and essential one under others. A necessary expense has been defined as one which is appropriate and helpful in developing

and maintaining the taxpayer's business. It need not be essential or indispensable. Usually, the taxpayer's judgment as to what is necessary will be accepted by the court. Am. Jur. cites Welch v. Helvering, 290 U.S. 111, for the last proposition.

Of course, gifts, entertainment and travel expenses are also treated by Section 274 I.R.S., but this section does not disqualify either of these expenses as deductible. It does specify rules of record keeping for certain types of such expenses, but, altogether, this section was passed to modify the Cohan rule to the extent stated, see Reg. 1.274-5(a)(3).

The statute, Section 274 specifically excepts from its operation certain types of expenses such as the business meal (see subd. (e)(1)). This was carried over to the Regulations, see 1.274-5(c)(2)(b). Substitute for the records are also provided for, see Reg. 1-274-5(c)(3). See also Section 5901, 34 Am. Jur., 2nd. Where records are lost, the taxpayer may reconstruct his expenditures or so it is provided in the regulations; see Reg. 1.274-5(c)(5). Also very importantly appropriate to the facts of this case is that expenditures of less than \$25. do not need any substantiation but are exempt from the needs of being recorded for corroborative purpose. The statute says so, see Sec. 274(d), the last sentence of which grants the power to fix a maximum amount that need not be recorded,

and, see the regulation 1.274-5(c)(3)(iii)(b). No travel expense is here involved; only entertainment. The court below took no notice of these regulations and statutory provisions but it seemed to be obsessed with the unalterable notion that corroboration was required but never the sworn testimony of the taxpayer. Sometimes he would require the name of the person entertained but when that was supplied, it would nevertheless disallow the item. At least, it was the claim of defendant that corroboration sometimes meant a record of the name and sometimes a record of the purpose, but the choice was never consistently made. 34 Am. Jur., 2nd, Federal Taxation, Sec. 5881, restates the regulations as allowing oral statements to corroborate the details of the expenditure; see La Forge v. Comm'r., 434 F. (2) 370. In Sec. 5883, Am. Jur., says, under the heading of business meal, the essentials of showing a business purpose is dispensed with. Also, Section 5890 restates the rule that expenditures of amounts less than \$25. need no substantiation. Note also Section 5892 which would modify the necessity for naming names.

Plaintiffs claim that the trial court acted to limit them in their proof of the "ordinary and necessary" character of these expenditures, and arbitrarily disallowed expenses for an alleged failure of proof in disregard of the foregoing statutory regulatory and case law. The lawyer

taxpayer was directed by the court not to present his case the way he had prepared it, but to proceed to a list of expenses disallowed by defendant which appeared in the latter's trial brief(A104). No preliminaries were permitted, A105-A109, and reemphasized at A114, but the individual items listed by defendant were considered. Starting with A109 and going through for the rest of the testimony, the trial proceeded as the court had directed. Offers of proof were not permitted except that at the end the court said he would permit the offers of proof to be made in a writing after the trial(A319-A320). That was done(A12-A33, A39-A42) but denied(A34-A43).

BANKERS CLUB

There is no dispute that Bankers Club is a luncheon club in the downtown business district. The dues were allowed, but the expenditures were not. Yet all the chits were produced and the checks in payment also were produced. Plaintiff tried to tell the court that he used this club only when he entertained a client or prospect, and the chits themselves show this fact. There is not a single chit for a single luncheon among them. Then, there is the fact that no chit is for more than \$25. All are under \$25, and therefore need no substantiation or corroboration. Besides, the use of this club falls under the statutory exception of business deal. As such, these

expenditures need no corroboration. Ergo the court erred. But, nevertheless, there was corroboration of place, amount, date, payment, purpose, and the names could be identified as the class of person entertained, such as claims adjuster, the New York manager of Martini-Rossi(A183,A184). Disregarding these expenditures was clearly erroneous.

THE WEST SIDE TENNIS CLUB AND
THE ATLANTIC BEACH CLUB

These are facilities. The cost of being a member are deductible if the use is more for business than for personal use. The usual measuring stick is to note the expenses incurred at each facility. If the expenditure at the facility for a business use is more than 50% than they are deductible.

The court disallowed the dues at both clubs. Yet, the expenses paid for business at each club was by far greater than for personal use. Also, taxpayer testified that at the West Side Tennis Club, he does not play tennis but used the facility to entertain neighbors, who are clients or prospective clients. The chits shown in each case that they were for such entertainment. In fact, the first check in January, was for \$500. and was payment on account of a party held on December 31, 1973 for a total of \$482. and the balance was on account of the 1963 dues. The testimony of the plaintiff naming names and the business purpose was

uncontradicted. It was reasonable, too, because he was actively engaged in seeking business from among his neighbors(A250-A252). If it weren't for these efforts, he would have long ago given up his law office in Manhattan. His business emanating from sources in New York City has been drying up. This year it was all but extinct.

Also in 1963, Section 274 was not strictly construed. Agent Levine said it was a transition year(A297). Also, Internal Revenue Bulletin, 1963.2, p. 129, extended the period of the leniency through January 1963, and Revenue Ruling 1963-44 through March 31, 1963. Yet, all payments of the taxpayers in 1963 were disallowed even the one incurred in December 1963.

Also at A257-A261, the oral testimony as to names of persons entertained were corroborated by the wife taxpayer's diary, but, nevertheless, the items were disallowed. The West Side Tennis Club membership is strictly maintained for business and all entertainment bills and the dues should have been deductible.

The situation is a bit different at Atlantic Beach Club because its use is for swimming. Nevertheless, applying the same yardstick of comparing chits for business guests to chits for personal use and there will be found an occasional chit for 70¢ as against a party that had cost \$43. See the discussion at A-164. The testimony regarding Atlantic Beach Club expenses starts at A-157 and goes through A-169.

However, at A253-A257, testimony is given respecting a dinner for 12 people costing \$76. This chit which had been disallowed at A168, A169, for alleged failure of proof of a business character. Yet, at A253-A257, the names of the persons entertained which had been noted in Mrs. Cataldo's diary, were offered, and the business character became obvious. Yet, it was disallowed without comment. None of the exceptions to substantiation alluded to above were observed. The talk always was of corroboration of an unnamed sort. Nor, could the court lawfully disregard the evidence which was uncontradicted and reasonable. To have done so, was clearly erroneous.

INTEREST CHARGES

Plaintiff taxpayer borrowed money on a commercial loan from Marine Midland Trust Company and from Manufacturers Hanover Trust Company. During 1963, he paid \$1878.72 in interest charges to these banks(A337). They had been taken as business expense deductions and they had been allowed by the deficiency determination as such(A367). On the trial, the defendant listed them as not deductible for business expense but deductible as personal expense. It gave no reason for its claim. No amendment to pleadings was made. The claim was advanced in its trial brief without explaining that they had been allowed as business expense in the deficiency letter. The court required proof of the business

expense character of these items (A337). The court had threatened plaintiff with contempt at A337, if he talked, so he remained sheep-like waiting to be told that it was alright for him to talk. He was permitted to ask questions of himself but the court stopped him at the very first questions and directed him to answer only such questions as the court would allow. The loans ranged from \$27,000. to \$30,000. at Marine Midland, and about \$2,000. to \$4,000. at Manufacturers(A342). Again, contempt was threatned at A343. The loans were to meet business expenses. Taxpayer ran a marginal business. The loans helped to pay court fees, and even to lend some money to a client to keep him solvent so that the lawyer could have him as a solvent client and earn fees (A343-A345,A350); to keep liquid and able to pay business expense (A338-A346).

The defendant asked about what it cost taxpayer for the tuition of his daughters. The reply was \$2200. The taxpayer said that he and his wife had the \$4500. from the practice and about \$900. more from investments and that by tight budget controls, they could live and maintain their daughters in college (A348).

At A77, the court stated that no evidence was made by taxpayers of the business nature of the loans but that they had to meet considerable personal expenses to meet the cost of two teen-age daughters in college. There is absolutely no evidence in the record to support this finding. It is absurd in the extreme to think that a lawyer working

hard to make a living would borrow more than \$30,000. to send two daughters to college. This statement is evidence of the length to which the court went to support a defendant's false claim to facts.

Interest is deductible as a business expense if the loan is for a business use. See 34 Am. Jr., 2nd, Sec. 7103. Also, see McNutt, Boyce Inc., 38 T.C. 472. The testimony of the taxpayer was that he needed the loans to keep him liquid in his business. This was uncontradicted, it was reasonable, it had been accepted by the three auditors. As a claim of non-deductibility, the defendant had the burden of persuasion. It not only failed to carry that burden, but it offered no proof whatsoever of the personal use of the loans.

POINT VI

THE MANY EVENTS WHICH COMBINED TO DEPRIVE THE PLAINTIFFS OF A FAIR TRIAL.

The biased views of the trial judge, the prejudicial actions of his law assistant, and the unlawful conduct of defense counsel combined to deprive plaintiffs of a fair trial. It is respectfully submitted that this case is an example of how the truth was lost in the milieu of a trial conducted by a judge without a jury.

The court threatened plaintiff's counsel with contempt so often that he actually prevented him from

performing his duties. He unlawfully held counsel for contempt and fined him \$50. There was no cause given for such contempt charges. It became evident upon a reading of the transcript that the trial judge was using his experience to prevent plaintiff from producing the proof of his case. The trial was completely, unfairly, handled and plaintiff was deprived of a fair opportunity to be heard.

The many errors called to this court's attention, *infra*, are as nothing compared to the conduct of the trial as a cause for reversal.

One of the prime reasons why the court's calculations are erroneous is that there is no starting point of the expense. The starting point of the total expense of \$25,000. plus stated in the return and the deficiency is ignored and no other amount appears in the evidence. This is a result that is directly attributable to the manner in which the trial was conducted.

a. The actions of the trial judge

At the outset, the undersigned counsel and taxpayer wants this court to believe he has had a very high regard for Judge Levett acquired in appearances before him on motions and on one special occasion where an application for a restraining order was under consideration. These occasions arose some fifteen or more years ago. It was plaintiff's impression that Judge Levett always sought out the truth, overlooked the inadequacies of oral communications, and was patient. However, his actions in this case had only a semblance of those qualities. The very first meeting he called was an occasion for him to insult this counsel by refusing to let him answer a question he had asked of him and by accusing him of purposely disposing of his diary.

It is hard to recall the exact order of things that happened in chambers but two things stand out. The first was the question about waiving a jury. Later events proved that plaintiff's acquiescence in the waiver was a mistake.

The other incident was that the law secretary left the room during a subsequent hearing called to fix a trial date. The judge wanted to go to trial May 8 or May 9, a date on which plaintiff had promised Judge Bonsal to be ready for trial in an admiralty case. Also,

plaintiff had a personal injury case appearing on the trial calendar in Supreme Court, Nassau County on May 1, 1973 which might also interfere with Judge Levett's plans. The law assistant, Mr. Madden, suddenly reappeared and told Judge Levett that counsel did not have a firm date before Judge Bonsal on May 9(A22-A25). Plaintiff's counsel said nothing. Judge Levett set the case down for May 7. Back at his office, plaintiff telephoned Judge Bonsal's chambers to tell him about Judge Levett's trial date and he learned that Mr. Madden had not asked about Judge Bonsal's plans to try the admiralty case on May 8 or 9 but only that Judge Levett had a small case involving counsel and could Judge Levett squeeze it ahead of Judge Bonsal's case, to which the polite reply was of course. Why did Mr. Madden infer that counsel was not telling the truth when he reported back to Judge Levett?

As it was, the personal injury case was not sent out immediately but counsel was asked to pick a jury on Thursday May 3, 1973. A jury was impanelled and by the end of the day an objection to the panel was made which objection could not be decided and it went over into May 5. On May 5, the assignment judge disbanded the Thursday panel and ordered the parties to pick a new jury. The day ended with no final decision on a jury.

Counsel returned to his office. He telephoned Mr. Madden to report his engagement. Mr. Madden would not

hear of any excuses and personally threatened counsel with a dismissal of his case on Monday if counsel did not appear for trial. He added that he would make such a record as would successfully stand up in this Appellate Court. This was a real threat to do injustice as there was no cause that could be stated for the dismissal except an untruthful one. which could obliterate the legal exudse that existed in this case. Counsel had kept defense counsel advised of the progress of the trial of the personal injury case. On Monday, May 7, counsel could do nothing else but go to Nassau County. He prepared an affidavit of engagement and he importuned his wife, the co-plaintiff, to take it to Judge Levett and Mr. Madden (A22-A25).

On Monday afternoon counsel received a letter from Mr. Madden written on May 3, 1973 saying be ready for trial or else (A33). Also on Monday afternoon counsel received a telephone call from Judge Bonsal to try the admiralty case on May 9. On Tuesday counsel applied to the assignment judge in Nassau County for permission to disband the jury because of these engagements in the Federal Court and as the trial parts were full in Nassau, the judge adjourned the case till the following Monday.

On Wednesday counsel settled the admiralty case and then offered to go to trial Thursday morning in this case. The trial of this case started at 10 A.M. Thursday morning. But, it was soon interrupted to hear motions on

the prior case tried. In the short space of time spent in the trial before the interruption, one of the attorneys for a party to the previous trial spoke to counsel and commended him for not talking back to the judge and making a clear headed attempt at proving the facts. He said he had been fined \$75. for contempt by Judge Levett and all he was trying to do was to represent his client. He characterized the judge's action as very unfair and he said that he recognized the unfair attitude Judge Levett was using against plaintiff as the same kind of opinionated and impatient attitude the judge had shown toward him in the prior case(A28-A29,A103). The trial judge started off treating plaintiff as unworthy of belief and he ended the trial by accusing plaintiff of having "stashed away" cash(A357a). In between, the court interrupted, acted as advocate for defendant, erred in keeping testimony out, and with the many threats of contempt "muzzled" plaintiff. The record should be read and if it is, this court will conclude, firmly, that legal error was made.

b. The contempt holding and the threat of contempt.

The judge made a threat of contempt at A90. Note the interruptions of the court with the process of asking the simple introductory questions of this witness. The whole of each and every page of the transcript covering this witness over the span of twenty-five pages is interrupted by the court. The judge even discouraged the use of the witness.

Notice the judge's questioning the witness to obtain the hearsay conclusion that the appellate conferee (a third party) had determined the disallowances stated in the deficiency at A94-A95 and then saying that the deficiency was correct and he would not allow any more questions of the witness(A98).

At A97 when finally a question is posed, it was only to the preliminary fact of whether the witness had stated in his pre-trial deposition the answer then read to him; the judge interrupted the answer by asking defense counsel if he had any objection to such question. Defense counsel stood up, startled, and said "objection". The court said "sustained". Then the judge harangued plaintiff's counsel and wound up demanding that counsel withdraw the witness(A98-A100). The plaintiff then took the stand but again the court interrupted with caustic comments and said at A104, "if you know what you are doing". The court then asked counsel to state generally what he intended to do but the court would not hear, insisting that plaintiff get into the specific items set forth as objections in defendant's trial brief(A106-A108). The judge insisted on plaintiff abandoning his proof and follow the judge's own direction and then while plaintiff was doing what he was directed to do, as best as he could, and despite the rude treatment of his case by the trial judge, the judge at A137

said, "I am going to ask you to show cause at this particular time as to why you shouldn't be held in contempt

At A143 after counsel had taken exception to a ruling that was clearly erroneous, viz; the disallowance of the Italian American Chamber of Commerce dues of \$100., the judge said "One more episode like this and I am going to hold you in contempt."

Then at A150 after defense counsel had made an outlandish statement about collections for clients, to which plaintiff objected, the court held counsel for contempt and fined him \$50. saying, "I am going to hold you in contempt now unless you have some explanation if that is worthwhile. I am going to fine you \$50." This was later translated into a written order dated May 18, 1973(A8-9). No cause for a criminal contempt was given at any time and especially after the assessment of this fine on May 10, 1973. None are charged in the written order. Instead, the order speaks of repeated interruptions; but there were no interruptions by counsel. The court assumed that plaintiff's counsel's efforts in adducing proof were interruptions and contemptuous. The judge, obviously, was using his power of contempt to keep plaintiff from proving his case.

This court can search the record for instances of counsel's interruptions of the court and it will not find any. Instead the court may flip the pages of the appendix

or of the trial transcript and stop at any page and it will find the court interrupting and haranguing counsel but it will not find counsel interrupting the court. It will find the court not only ready to interrupt counsel, but also to condemn him and personally, to engage in the trial of the case on the side of the defendant. Note the many instances of trial errors complained of herein. Even the written order of contempt speaks of the alleged contempt as a civil contempt when by definition a contempt ending in a fine is a criminal contempt. See U.S. v. Yates, 107 F.S. 412, rev'g 227 F.(2) 848; and Gompers v. Buck's Stove & Range Co., 221 U.S. 418. And it was entered despite the judge's cooling off and permitting counsel to purge himself because he did not have the money with which to pay the fine(A357-A357a). Counsel then wrote his letter of May 8, 1973 to the court denying wrong doing or even having any contemptuous thoughts of the court(A10). Still believing in the innate honesty of the judge himself, he pleaded that there was no obstruction of justice and that every action of his was the normal act of a lawyer advancing his client's cause. Such is not contempt, see 17 C.J.S., Contempt, Sec. 2; and 18 U.S.C.A. 402.

Our Supreme Court said In re Michael, 326 U.S. 224, at page 227, that the contempt power of a court should not be used to make inroads in the procedural safeguards of

the Bill of Rights. The same case quotes from the intention of Congress in inacting the statutory power to hold one for contempt is "to safeguard procedures by limiting courts, as Congress is limited...to the least possible power adequate to the end proposed."

Our Supreme Court said in In re McConnell, 370 U.S. 230, at pp. 236-237, about the respondent, a lawyer who had tried the case, that as there was no attempt at obstructing justice what he had said could not be a contempt of court. There as here, the trial court had cut off the attorney from trying the case as he had prepared it and refused his offers of proof.

In Hallinan v. U.S., 182 F. (2) 890, cert. den. 341 U.S. 982, rehearing denied, 342 U.S. 956, and 343 U.S. 935, the lawyer said to be in contempt was said to have the right to make every legitimate effort he can, in support of his client's cause and if he does so, he cannot be held for contempt. An offer of proof may be made without fear of contempt. And in Sprinkler v. Davis, 111 F. (2) 925, the court said that action taken by counsel during the course of trial under the mistaken view of the law does not constitute contempt.

In Weiss v. Burr, (9 Cir., 1973) 484 F.(2) 973, the court held that allocation required when sentencing after trial, that the record could be searched for the

sufficiency of the holding for contempt. The failure to state facts in support of the finding requires resort to the record. It said further that unfettered discretion to punish for contempt is not permitted to Federal judges. A court cannot deprive attorneys of their liberty or property in order to avert perceived threats to the administration of justice if the court's action would unduly impair legitimate non-disruptive advocacy. The mere transgression of an order governing trial procedures, by trial counsel, is almost invariably, insufficient to sustain a charge of contempt. It must entail a persistent disregard for the court's authority that could have been avoided through a reasonable good faith effort. Where it is difficult for a lawyer to compromise and in reacting to the court's order, he transgresses it, the action is not contempt.

Chief-Justice Burger in In re Little, 404 U.S. 53, at p. 556, said "a contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except upon a full ventilation of the facts." Here, the Chief-Justice eschews a mere difference of opinion between court and counsel as to whether an act transgresses an order contemptuously or comes within the province of trial advocacy. Also, he requires the reviewing court to examine

the facts.

In the case at bar, plaintiff's counsel was reduced to a submissive hulk, with no ability to think of what he must do about winning his case. He was required by the court to try the case in the worst way possible for a successful conclusion by the elimination of the important facts of how he ran his law office, how he lawfully sought business to continue in business, how the deficiency notice was arbitrary, how the auditors made a record of his diary entries, and had disallowed all expenses over \$25. and allowed all items under that amount. Yet, all were of business expense variety, not of gifts, travel or entertainment, but for an occasional restaurant charge.

On the other hand, there were no loud noises, no raucousness, no wilful disturbances, no interruption of the trial, just a seeking after an opportunity to prove his case. The judge's threats of contempt, (plaintiff's counsel had no money and could not afford to pay a fine and he tried his best to avoid incurring the displeasure of the court) and his sarcastic statements and shoutings to plaintiff's counsel only served to scatter the latter's thoughts. Even when, furiously, counsel tried to collect his thoughts at the turn of events created by one of the rulings, the judge would bounce upon him in a loud voice and excuse his loudness by saying that counsel was deaf. Had calm and dignity prevailed counsel would have heard very well enough and had

the court followed the law in its rulings, counsel would have had no difficulty in understanding the court. Not only was there no contempt but the court's use of its contempt power served only to deprive plaintiff of a fair opportunity to try their case.

Also, at practically every page of the testimony there was an interruption, or bawling out, or an untruthful charge and a direction to try the case in a manner which would not produce the truth. As stated above, this court may thumb the transcript and stop at any page and it will find the court speaking, generally engaging in some harangue addressed to plaintiff's counsel.

How could plaintiff's case be tried fairly when their counsel was so badly treated?

Not only was the trial court guilty of interfering with plaintiff's counsel's efforts at trying plaintiff's case his way, but also it made several errors of substance which went to the material resolutions of fact against plaintiff.

In Peckham v. United States, 210 F.(2) 693, it was said that the injection of its views in the trial of a case by the trial judge was reversible error. This court said that in the light of the disorderly atmosphere at the trial, it would require too great a degree of speculation to say that appellant was fairly tried.

In Kotteakos v. United States, 328 U.S. 758, at 760-761, the court said of the Harmless Error Rule, 28 U.S.C.A. 2106, 2111, Rule 61,

that while the party seeking reversal has the burden of proof, yet the comments of Congress on passing the statute were (H.R. Rep. No. 913, 65th Cong. 3rd Sess. 1) that the proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding the litigation, rest upon the one who claims under it.

In United States v. Brandt, 196 F. (2) 653, this court had occasion to review the personal activity of the trial judge in the trial of that case and said that it was reversible error for the trial judge to act as an advocate for the successful party.

Not once did plaintiff counsel call names or pass judgment on the actions of the trial judge. At one place he excused his failure to respond as having become discombobulated(All). He kept apologizing to the court and at most, he found refuge in a resort to taking exception to a ruling. The best proof of this statement is for the court to read the transcript. Plaintiff knew that his position would worsen with fines for alleged contempt and as he had no money, he was overdrawn at the bank, and note the amount of bank charges he had paid during the year; see f.o.f. No. 8(A51-A58). He did not relish the loss of his freedom as well as his money for the dubious privilege of assuming that the law

meant what it said, that a citizen who believed that he had been compelled to pay too much taxes could recover them in a suit for refund. Nothing could be more illusory. Fighting young assistant attorney who do not know the difference between a need to spend money in the effort to acquire business from a good time or who are not cognizant with a worker's abhorrence to spending money on a good time when there were family needs for the little that was earned, but instead rejected all claims for the sport of the cause, and the making of a personal record. Then the coup de grace comes when you finally think that you will get a chance to make your thoughts known to an experienced judge, you are muzzled by threats of contempts, by fines, by sarcastic name calling by the judge who says he is keeping order. The idea turns a nightmare into a lost week-end. Please read the record.

c. The actions of Mr. Madden the law secretary.

In addition to the remarks made above about Mr. Madden, he failed to give the court Exhibits 24 and 25 for identification, which had been personally handed to him two days before trial (A23). Yet, he was told what the lists were and their purposes. The admissions shown in the lists Ex. 25 for id. would have limited the trial to those items that were never admitted to be deductible. Yet, on the day of the trial, defense counsel handed in his list of items he

objected to. That list increased the items objectionable by 19, but that list was in the judge's hands at the opening of the trial. The judge did not know about plaintiff's lists until the last day of trial when plaintiff offered them (A315). Note that at A316, the Court disowns the fact that he had ordered plaintiff to proceed to defendant's list of deductions. Also on this page the court said it would ask Mr. Madden to look it up. Well, the decision was to deny all of plaintiff's offers of proof.

Finally, there is the fact that plaintiff had noticed during the trial that as each decision was made, Mr. Madden was leaning on the judge's shoulder. He would tell the judge the defense attorney was right and the judge would disallow the item under consideration. Deponent overheard Mr. Madden say specifically "disallowed" and the judge would announce "disallowed". At another point, Mr. Madden shifted his position to one side of the judge but signalled by a waiving of his hands disallowed. When the item for \$867., a check paid to National Security Corp. was before the court, the court seemed to be convinced that plaintiff had not been reimbursed for the item, the client had become insolvent, he looked up and plaintiff detected a sign of old-age weariness come over the judge. Then he observed that the judge turned to Mr. Madden who by that time had taken a seat in the jury box. Mr. Madden signalled by

moving his hands sideways signifying disallowed.

d. Defense counsel's actions

Defense counsel committed subornation of perjury in inducing Levine to testify that he did not see the diary (A273-A307). Instead he said that he had seen the yellow sheets marked Exhibit 29 for id. Yet, on his deposition, Levine had stated he had had the diary (A277-A278). Even Mr. Reilly asked him questions about the diary (A25-A26). This was done to obstruct justice because the truth was that the diary was given to Levine and the diary had notations of ordinary business expenses; whereas the yellow sheets had only the dollar amounts. Perjury committed to keep the truth from the court is an obstruction of justice. See *In Ex Parte Hudgings*, 249 U.S. 378.

Defense counsel had taken Exhibit 29 from plaintiff during a recess A277 and he had discussed it with the witness who then made his denials after the judge returned and the testimony of the witness was resumed.

Defense counsel also refused to produce documentary evidence in his possession despite the subpoena served (1,30,31,A155,A175,A292,A291,A294).

Defense counsel all through the trial kept answering the judge's inquiry about the rule of law incorrectly when he must have known all along that his statements were incorrect. Please observe his claims at A174,A217,A219,A226,A301,A312,A337,A347.

In short, "if a trial is unfair, it might not do

to speculate as to what would have been the outcome had a fair and impartial hearing been accorded." See Carter Products v. F.C.C., 201 F.(2) 446,454, Also this case states that where a case is still open for taking testimony, it is error no to do so.

CONCLUSION

Appellants respectfully pray this court to reverse and to order a new trial by a different judge and to restore plaintiffs' right to a trial by jury. Also that the contempt order be vacated and the \$50. fine be remitted.

Respectfully submitted,

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Attorney pro se and for
Appellant.

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issues Presented	2
Statement of Facts	3
Relevant Statute and Rule	6
Applicable Regulations	8
ARGUMENT:	
POINT I—The District Court correctly determined that the taxpayers were not entitled to a refund	10
POINT II—The uncorroborated testimony of the taxpayer was not binding on the District Court merely because it was uncontradicted	15
POINT III—In a refund suit, the taxpayer has the burden of proof with respect to every claimed deduction	17
POINT IV—The findings of the District Court disallowing various deductions claimed as ordinary and necessary business expenses were not clearly erroneous	19
a. Apartment, Electricity and Gas	21
b. Club Dues and Entertainment	21
c. Petty Cash	25
d. Case Charges	27
e. Interest and Contributions	28
POINT V—The taxpayers were afforded a fair trial	29
POINT VI—The repeated refusal of the attorney-taxpayer to abide by the directions of the Court constituted contempt	31
CONCLUSION	33

TABLE OF CASES AND AUTHORITIES

	PAGE
<i>Cases:</i>	
<i>Andress v. Commissioner</i> , 51 T.C. 863 (1969), <i>affirmed</i> , 423 F.2d 679 (5th Cir. 1970)	24
<i>Baird v. C.I.R.</i> , 438 F.2d 490 (3rd Cir. 1971)	16, 18
<i>Ballou v. United States</i> , 370 F.2d 659 (6th Cir. 1966), <i>cert. denied</i> , 388 U.S. 911	15, 16
<i>Banks v. C.I.R.</i> , 322 F.2d 530 (8th Cir. 1960)	16
<i>Bogardus v. Commissioner</i> , 302 U.S. 34 (1937)	15
<i>Commissioner v. Duberstein</i> , 363 U.S. 278 (1960)	20
<i>Commissioner v. Heininger</i> , 320 U.S. 467 (1943)	20
<i>David v. Phinney</i> , 350 F.2d 371 (5th Cir. 1965)	19
<i>William du Pont, Jr. v. United States</i> , 64-1 U.S.T.C. ¶ 9023 (D. Del. 1963)	19
<i>In re Gates</i> , 478 F.2d 998 (D.C. Cir. 1973)	32
<i>Goldman v. C.I.R.</i> , 388 F.2d 476 (6th Cir. 1967)	16
<i>Helvering v. Taylor</i> , 293 U.S. 507 (1935), <i>affirming</i> , <i>Taylor v. Commissioner</i> , 70 F.2d 619 (2d Cir. 1934)	10, 17, 18
<i>Herbert v. C.I.R.</i> , 377 F.2d 65 (9th Cir. 1966)	18
<i>Estate of Hibbs</i> , 16 T.C. 535 (1951)	18
<i>Hull v. C.I.R.</i> , 87 F.2d 260 (4th Cir. 1937)	18
<i>Hull v. Littauer</i> , 162 N.Y. 569 (1900)	15, 16
<i>I.B.M. v. United States</i> , — F.2d — (2d Cir. Dec. 17, 1973) (Docket Nos. 1133-6) Slip. Op. 5628-5633, <i>cert. denied</i> , — U.S. — (May 13, 1974)	32
<i>Johnson v. United States</i> , 45 F. Supp. 377 (S.D. Cal. 1941), <i>reversed</i> , 135 F.2d 189 (9th Cir. 1943)	22
<i>La Forge v. C.I.R.</i> , 434 F.2d 370 (2d Cir. 1970)	23

	PAGE
<i>Larchfield Corp. v. United States</i> , 373 F.2d 159 (2d Cir. 1966)	10
<i>Lewis v. Reynolds</i> , 284 U.S. 281 (1932)	10, 17
<i>Sarah Marquis v. Commissioner</i> , 49 T.C. 689 (1969)	29
<i>Massingale v. United States</i> , 59-1 U.S.T.C. ¶ 9298 (D. Ariz. 1959)	19
<i>In re McConnell</i> , 370 U.S. 230 (1962)	31
<i>Missouri Pacific Railroad Co. v. United States</i> , 338 F.2d 668 (Ct. Claims 1964)	10, 18
<i>Purcell v. Waterman S. S. Corp.</i> , 221 F.2d 953 (2d Cir. 1955)	16
<i>Quock Ting v. United States</i> , 140 U.S. 417 (1891)	16
<i>Rockwood Pottery Co. v. C.I.R.</i> , 45 F.2d 43 (6th Cir. 1930)	15
<i>Roybark v. United States</i> , 218 F.2d 164 (9th Cir. 1954)	19
<i>Sanford v. Commissioner</i> , 412 F.2d 201 (2d Cir. 1969), cert. denied, 396 U.S. 841	24
<i>Service Life Insurance Company v. United States</i> , 189 F. Supp. 282 (D. Neb. 1960)	19
<i>Steel v. C.I.R.</i> , 437 F.2d 71 (2d Cir. 1971)	24
<i>Tauber v. Commissioner</i> , 24 T.C. 179 (1955)	18
<i>United States v. Dreschler</i> , 179 F.2d 863 (2d Cir. 1950) ..	10
<i>United States v. Galante</i> , 298 F.2d 72 (2d Cir. 1962)	31
<i>United States v. Pfister</i> , 205 F.2d 538 (8th Cir. 1953) ..	18
<i>United States v. Schiffer</i> , 351 F.2d 91 (6th Cir. 1965), cert. denied, 384 U.S. 1003 (1966)	31
<i>Walsh v. United States</i> , 163 F. Supp. 421 (D. Neb. 1958)	18

	PAGE
<i>Weir v. Commissioner</i> , 283 F.2d 675 (6th Cir. 1960)	18
<i>Weiss v. Burr</i> , 484 F.2d 973 (9th Cir. 1973)	31, 32
<i>Welch v. Helvering</i> , 290 U.S. 111 (1933)	19, 20
<i>Werner v. C.I.R.</i> , 242 F.2d 938 (9th Cir. 1957)	15
<i>Zeeman v. United States</i> , 395 F.2d 861 (2d Cir. 1968)	10

Statutes:

Internal Revenue Code of 1954, as amended
Title 26, United States Code

Sec. 162(a), 26 U.S.C. § 162(a)	11
Sec. 162(b), 26 U.S.C. § 162(b)	28
Sec. 170, 26 U.S.C. § 170	29
Sec. 274(a), 26 U.S.C. § 274(a)	22, 23
Sec. 274(d), 26 U.S.C. § 274(d)	23, 28
Sec. 6213, 26 U.S.C. § 6213	3
Sec. 6214, 26 U.S.C. § 6214	17

Title 28, United States Code:

Sec. 1346(a)(1), 28 U.S.C. § 1346(a)(1)	4, 10
---	-------

Rules:

Federal Rules of Civil Procedure, Rule 52(a)	20
Federal Rules of Criminal Procedure, Rule 42(a) ..	22
Rules of Practice before the Tax Court of the United States, Rule 32	17, 18

Regulations:

Income Tax Regulations	
§ 1.274-2(c) (6)	23
§ 1.274-5(c) (iii)	24
§ 1.274-5(c) (6) (iii)	22
Revenue Procedure 63-3	24
Revenue Ruling 63-144	24

Treatises:

34 Am. Jur. 2d, Federal Taxation ¶ 9318	18
Mertens, Federal Income Taxation (1961-1964 Reg- ulations)	22
Mertens, Federal Income Taxation (1961-1965 Rul- ings)	24

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-2602

ANTHONY B. CATALDO and ADA W. CATALDO,
Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF FOR APPELLEE

Preliminary Statement

This appeal is from a final judgment of the United States District Court for the Southern District of New York, denying the appellants' claim for an income tax refund. The judgment was rendered by the Honorable Richard H. Levet on July 13, 1973, following a two and one-half day trial (A86). The tax year involved was 1963 and the amount claimed by the taxpayers, husband and wife, was \$2,210.87 plus interest of \$507.62. The District Court's Opinion, setting forth detailed findings of fact and conclusions of law, dated June 29, 1973, has not been officially reported. It appears in part at 73-2 USTC ¶ 9585 and in full at pages A44-A85 of the Appendix.

Anthony B. Cataldo, a lawyer by profession, appeared *pro se* and represented his wife in the District Court below.

He was found in contempt by Judge Levet after repeated admonitions for refusing to abide by the Court's directions, for interrupting the Court, and for continuing to argue evidentiary points after rulings had been made. A Contempt Order imposing a fine of \$50.00 was signed by Judge Levet on May 18, 1973 (A8-A9). No separate appeal was taken from this Contempt Order. However, appellants have contested its legality and propriety in their brief.

Issues Presented

1. Did the taxpayers demonstrate by a preponderance of the credible evidence that they had overpaid their taxes and are entitled to a refund?
2. Was the District Court required to rule in favor of the taxpayers on the basis of the uncorroborated testimony of the husband merely because the testimony was uncontradicted?
3. In an income tax refund suit does the taxpayer or the Government have the burden of proof with respect to claimed deductions which were not previously contested by the Commissioner?
4. Did the taxpayers sustain their burden of demonstrating by a preponderance of the credible evidence that they were entitled to various deductions claimed as ordinary and necessary business expenses and contributions to charity?
5. Did the efforts of the District Court to introduce order into the disjointed presentation of evidence by the taxpayers deny them an opportunity to be heard?
6. Did the repeated refusal of the lawyer-taxpayer to abide by the directions of the Court in the conduct of the trial constitute contempt, punishable by a fine of fifty dollars?

Statement of Facts

The taxpayers, Anthony B. Cataldo and his wife, Ada W. Cataldo, filed a joint return for the 1963 tax year. Then, as now, they resided in a five room apartment in Forest Hills, New York. The wife did not work and had no other source of income. The husband maintained an office at 1 Cedar Street, in downtown Manhattan for the practice of law.* The taxpayers' two daughters were both of college age and during the school year attended the University of Michigan (A. 344-A. 345).

The taxpayers reported a total income of \$30,735.03. Of that amount \$29,750.58 was attributed to the husband's law practice; \$922.00 was received as dividend income; and, \$62.45 was received as interest income. As deductions, the taxpayers claimed a loss from the sale of capital assets of \$1,000.00, ordinary and necessary business expenses in connection with the husband's practice of law of \$25,251.75, and various charitable contributions and other expenses of \$1,824.30. Claiming a taxable income of only \$264.98, the Cataldos declared and paid a tax of \$286.54.** An audit by the Internal Revenue Service soon followed.

Following numerous conferences between Mr. Cataldo and various officials of the Internal Revenue Service, a deficiency notice issued on September 22, 1967, asserting a tax due of \$2,497.41 and a deficiency of \$2,210.87.

The taxpayer's did not file a petition with the Tax Court, as was their right. 26 U.S.C. § 6213. Accordingly, after the ninety-day statutory period, a deficiency assessment was issued by the Manhattan District Office of the Internal Re-

* The office was provided free of charge to Mr. Cataldo by the Association of Average Adjusters of the United States, of which he was the part-time Executive Secretary.

** \$243.21 of this amount was the husband's Social Security self-employment tax (Schedule C-3).

venue Service. The taxpayers paid the deficiency plus the assessed interest of \$507.62, and then filed a claim for refund with I.R.S. The refund claim was never favorably acted upon and the taxpayers thereupon filed a timely suit for refund in the District Court pursuant to 28 U.S.C. § 1346(a)(1).

In the District Court, the Government did not contest the amount of income reported by the taxpayers on their return. But the Government did put in issue most of the taxpayers' claimed deductions from income. The disputed deductions were as follows:

- (a) Schedule "C" expenditures in connection with the husband's law practice of \$25,251.75;
- (b) Charitable contributions of \$542.00;
- (c) Medical expenses of \$1,035.10;* and
- (d) State and local sales taxes of \$210.00.

Following extensive pre-trial discovery—and after the taxpayers' motion for summary judgment had been denied—the case was called for trial before the Honorable Richard H. Levet. At several conferences held in April and May of 1973, Judge Levet attempted to limit the issues for trial. Responding to the Court's request, the Government submitted with its trial memorandum a listing of the taxpayers' claimed expenditures which it did *not* dispute. The Government also set forth in an appendix to its trial memorandum a listing of the taxpayers' claimed expenditures which it did dispute. Both of these listings were based on a schedule of claimed expenditures which had been previously submitted by the taxpayers.

* The Government does not dispute that these medical expense were incurred. It contends that the amount allowable as in excess of 3% of adjusted gross income is erroneous in so far as the reported adjusted gross income figure is understated.

The trial was scheduled to commence on May 7, 1973. However, because of another court commitment, Mr. Cataldo requested and was granted an adjournment until May 10, 1973. At the opening of the trial the Government immediately indicated to the Court those claimed expenditures which it conceded and those which were contested (A87). Little progress was made from this point. The taxpayers called as their first witness an I.R.S. Revenue Agent, Robert Levine, who had participated in the audit of the 1963 tax return. The Court sustained the Government's objection to further questioning of this witness when it became apparent that Mr. Cataldo's only purpose was to review in detail the history of the audit (A89, A95, A100-A101). The taxpayers called as their final witness Mr. Cataldo. The Court's fears as to the difficulties of a party representing himself *pro se* under these circumstances were soon fully realized. Mr. Cataldo persisted in questioning himself concerning the circumstances of the I.R.S. audit (A102-A104). When the Court insisted that the questioning be directed to establishing the claimed deductions, Mr. Cataldo argued that other preliminaries had to be established (A105). In order to resolve the impasse which had developed so early in this non-jury trial, Judge Levet adopted the procedure of himself asking the witness—Mr. Cataldo—the basis for the claimed deductions which were contested by the Government (A108-A109). Mr. Cataldo, as witness and as counsel, was then allowed to introduce any evidence he had to offer. When the Court had completed the listing of disputed items, the taxpayers were invited to offer evidence on any other expenditures which they claimed as deductions (A352-A353).

The trial was completed in two and one-half days. Although all did not go smoothly, the taxpayers were afforded every opportunity to present their case. On the afternoon of the first trial day, the Court held Mr. Cataldo in contempt for his repeated disregard of orders to cease argument after rulings and to refrain from interrupting the Court and

Government counsel when they were speaking. A fine of \$50.00 was imposed (A150). A written order reciting the facts of the contempt and imposing the fifty dollar fine was signed by Judge Levet and entered by the Clerk on May 18, 1973 (A8-A9).

At the conclusion of the trial, the taxpayers had failed to demonstrate that they had overpaid their tax or that they were entitled to a refund. Judgment was entered for the Government.

Relevant Statute and Rule

Internal Revenue Code of 1954, as amended

Title 26, United States Code

Sec. 162(a), 26 U.S.C. § 162(a)

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . .

Sec. 274, 26 U.S.C. § 274

(a) Entertainment, Amusement, or Recreation.—

(1) In General.—No deduction otherwise allowable under this chapter shall be allowed for any item—

(A) Activity.—With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with, the active conduct of the taxpayer's trade or business, or

7

(B) Facility.—With respect to a facility used in connection with an activity referred to in subparagraph (A), unless the taxpayer establishes that the facility was used primarily for the furtherance of the taxpayer's trade or business and that the item was directly related to the active conduct of such trade or business,

and such deduction shall in no event exceed the portion of such item directly related to, or, in the case of an item described in subparagraph (A) directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), the portion of such item associated with, the active conduct of the taxpayer's trade or business.

(2) Special Rules.—For purposes of applying paragraph (1)—

(A) Dues or fees to any social, athletic, or sporting club or organization shall be treated as items with respect to facilities.

* * * * *

(d) Substantiation Required.—No deduction shall be allowed—

(1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),

(2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or

(3) for any expense for gifts,
unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his own state-

ment (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility, or receiving the gift. The Secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations.

Federal Rules of Criminal Procedure,

Title 18, United States Code

Rule 42(a)—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Applicable Regulations

Income Tax Regulations,

26 Code of Federal Regulations

§ 1.274-5

(c) *Rules for substantiation, (1) In general.*

A taxpayer must substantiate each element of an expenditure (described in paragraph (b) of this section) by adequate records or by sufficient evidence corroborating his own statement except as otherwise provided in this section. Section 274(d) contemplates that a taxpayer will maintain and produce such substantiation as will constitute clear proof of an expenditure for travel, entertainment, or gifts

referred to in section 274. A record of the elements of an expenditure made at or near the time of the expenditure, supported by sufficient documentary evidence, has a high degree of credibility not present with respect to a statement prepared subsequent thereto when generally there is a lack of accurate recall.

* * * * *

(2) Substantiation by adequate records—(i) In general.

To meet the "adequate records" requirements of section 274(d), a taxpayer shall maintain an account book, diary, statement of expense or similar record (as provided in subdivision (ii) of this subparagraph) and documentary evidence (as provided in subdivision (iii) of this subparagraph) which, in combination, are sufficient to establish each element of an expenditure specified in paragraph (b) of this section. It is not necessary to record information in an account book, diary, statement of expense or similar record which duplicates information reflected on a receipt so long as such account book and receipt complement each other in an orderly manner.

(ii) Account book, diary, etc. An account book, diary, statement of expense or similar record must be prepared or maintained in such manner that each recording of an element of an expenditure is made at or near the time of the expenditure.

* * * * *

(iii) Documentary evidence. Documentary evidence, such as receipts, paid bills, or similar evidence sufficient to support an expenditure shall be required for—

(a) Any expenditure for lodging while traveling away from home, and

(b) Any other expenditures of \$25 or more, except, for transportation charges, documentary evidence will not be required if not readily available.

* * * * *

ARGUMENT

POINT I

The District Court correctly determined that the taxpayers were not entitled to a refund.

In a tax refund suit it has long been recognized that the taxpayer must show not only that the assessment made against him was erroneous; he must also establish the exact amount of the tax due. *Lewis v. Reynolds*, 284 U.S. 281 (1932); *United States v. Dreschler* 179 F.2d 863 (2nd Cir. 1950). Otherwise, he is not entitled to recover anything. *Helvering v. Taylor*, 293 U.S. 507, 514-515 (1935), affirming *Taylor v. Commissioner*, 70 F.2d 619 (2nd Cir. 1934). Indeed, because the action is one for restitution (for money had and received), and equitable in nature, it has been held that "a plaintiff must show that good conscience requires the refund." *Zeeman v. United States*, 395 F.2d 861, 865 (2nd Cir. 1968). See also *Larchfield Corp. v. United States*, 373 F.2d 159, 164 (2nd Cir. 1966). As succinctly stated by the Court of Claims (which has joint jurisdiction with the District Courts over tax refund suits, 28 U.S.C. § 1346(a) (1)),

"... the taxpayer has the burden of proving the exact dollar amount to which he is entitled. See *Helvering v. Taylor*, 293 U.S. 507, 155 S. Ct. 287, 79 L.Ed. 623 (1935). This of necessity puts in issue every credit or deduction found in the particular tax return for which refund is sought or in a related tax return." *Missouri Pacific Railroad Co. v. United States*, 338 F.2d 668 (Ct. Claims 1964) (footnote omitted)

With these principles in mind, the Court's inquiry should be focused on a relatively narrow question: what amount of

tax did the appellants establish by a preponderance of credible evidence to have been overpaid? It is respectfully submitted that the taxpayers failed to affirmatively prove that they were entitled to any refund. Thus, the District Court properly entered a judgment declaring that "plaintiffs take nothing" (A87).

It is conceded that the husband earned income of \$29,750.58 from his law practice. The crucial dispute revolves around what amount he was entitled to deduct for ordinary and necessary business expenses pursuant to Section 162 of the Internal Revenue Code, 26 U.S.C. § 162. On their return the taxpayers claimed \$25,251.75 of such expenses. In their brief they assert the rather quaint theory that this declaration on their tax return constitutes evidence that these expenditures were actually incurred as ordinary and necessary business expenses and therefore should be the starting point for the Court's determination as to what tax is due. (Appellants' Brief, pp. 10-11). But, as the authorities already cited indicate, just the opposite is the rule. The taxpayers must establish stone by stone what expenses they incurred and whether they were deductible as ordinary and necessary business expenses.

We start with the Government's concession that claimed expenditures of \$10,575.67 were deductible* (A. 50-A. 58). We add to this the District Court's findings that the following ~~expenses~~ should also have been allowed as business deductions:

* In their brief Appellants contend that the Government admitted \$12,475.87 as allowable business expenses prior to trial. (Appellants' Brief, p. 10). However, the record shows that of this amount \$1,878.72 was attributable to interest charges and \$303.00 was attributable to contributions (A63). The Government's consistent position has been that these expenses although incurred were only allowable as itemized deductions.

25% of the rent payments for taxpayers' apartment	\$ 490.60
25% of payments for electricity bills for taxpayers' apartment	44.24
Entertainment expenses	109.00
Case Charges	873.00
	\$ 1,516.84

Thus, the District Court found that the taxpayers had established total allowable business expenses of \$12,002.57, resulting in a net profit of \$17,658.07 (not \$4,503.83 as claimed by taxpayers on their return).

The taxpayers attempted, without success, to prove that the following additional claimed business expenses should have been allowed as deductions from professional income:

Additional 25% payment of rent for taxpayers' apartment	\$ 490.60
Additional 25% payment of electricity bill for apartment	44.20
Gas bills for apartment	24.11
Dues paid to various social and political clubs	1,299.53
Entertainment expenses	2,128.46
Case Charges	1,279.13
Petty Cash	3,823.78
Interest Charges	1,877.51
Contributions	306.00
	\$11,273.32*

* If the taxpayers had succeeded in proving these additional claimed expenses of \$11,273.32 the total amount allowable would only have been \$23,365.83 as opposed to the \$25,25.175 claimed on the return.

That the District Court was correct in rejecting the taxpayers' contentions on these additional expenses will be more fully demonstrated in Point IV below. Suffice it to say that the Court properly determined the taxpayers' allowable business deductions, calculated net professional income together with other incomes, and then proceeded to consider their claimed personal deductions.

The taxpayers realized an adjusted gross income of \$17,642.52 (Line 9, page 1 of Form 1040). This amount was determined as follows:

Professional Income	\$17,658.07
Interest Income	62.45
Dividend Income	922.00
	\$18,642.52
Less Net Losses from sale of Capital Assets (\$1,000.00 maximum)	\$ 1,000.00
	\$17,642.52

From this amount the District Court allowed personal deductions of \$2,941.65. The only controversy with respect to the amount of claimed personal deductions of \$2,941.65. involved charitable contributions. The Government conceded \$306.00 in substantiated contributions which had been erroneously claimed by the taxpayers as business expenditures. But, the Government contested the taxpayers' claim of \$547.00 in cash contributions. No creditable evidence was offered to support these alleged contributions. Thus, the following personal deductions were allowed:

14

Contributions	\$ 306.00
Interest Expense*	1,886.21
Taxes	238.50
Medical and Dental Expense**	510.94
Other Deductions	0.00
	\$ 2,941.65

The Court then completed the appellants' tax return as follows:

Adjusted Gross Income	\$17,642.52
Less Itemized Deductions	2,941.65
	\$14,700.87
Less Personal Exemptions(4)	2,400.00
Taxable Income	\$12,300.87

Applying the applicable tax rate the Court determined that appellants owed a tax of \$2,800.60. Subtracted from this was a dividend credit of \$9.66. Added to it was the maximum self-employment tax of \$259.20. The net tax owing is \$3,059.80. Since the appellants have paid a total tax of only \$2,497.34, they clearly have not overpaid their taxes and they are not entitled to a refund.

* Interest expense included the \$1,877.51 which had been claimed by the taxpayers as a business deduction plus a payment of \$8.70 to Hornblower & Weeks.

** On their return taxpayers claimed expenditures of \$1,216.62 for drugs and medical care. Because of a low adjusted gross income they were able to declare an inflated deduction for drug expenses above 1% and other medical expenses above 3% of AGI. At trial the Government did not contest the amount expended on drugs and medicine. It merely argued that the deduction had to be recomputed. See A81).

POINT II

The uncorroborated testimony of the taxpayer was not binding on the District Court merely because it was uncontradicted.

The presentation of the taxpayers' case was marked by a striking absence of documentary evidence. For the most part they relied on the oral testimony of the husband, Anthony Cataldo, who attempted to recall the circumstances surrounding various claimed expenditures. Appellants now urge that it was error for the District Court to disregard the husband's testimony because although uncorroborated, it was uncontradicted. In support they cite such venerable authority as *Hull v. Littauer*, 162 N.Y. 569 (1900) as well as other selected New York and federal * cases. Because the Government likewise relies on *Hull v. Littauer*, but disputes appellants' reading of the case, it is instructive to consider exactly what the New York Court of Appeals said in that decision:

"Generally, the credibility of a witness who is a party to the action and therefore, interested in its result,

* The federal cases cited by appellants are, for the most part, inapposite. *Pogardus v. Commissioner*, 302 U.S. 34 (1937), a 5-4 decision, held that on review from the Board of Tax Appeals, the court could substitute its judgment for a determination which was a mixed question of law and fact. *Wener v. C.I.R.*, 242 F.2d 938 (9th Cir. 1957) at most stands for the principle that the testimony of a taxpayer which is uncontradicted, unimpeached and not inherently improbable "cannot be disregarded." *Id.* at 944-45. *Rockwood Pottery Co. v. C.I.R.*, 45 F.2d 43 (6th Cir. 1930) held that in valuing stock the Board of Tax Appeals could not reject the taxpayer's "method which was doubtless approximately correct, and perhaps almost exactly right, and adopt [the Commissioner's] method which was certainly wrong." *Id.* at 46. The only cited authority which supports appellants' contention is the dissent in *Ballou v. United States*, 370 F.2d 659, 664 (6th Cir. 1966), cert. denied, 388 U.S. 911.

is for the jury; but this rule, being founded in reason is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness." *Hull v. Littauer, supra*, at 472.

The Government submits that the uncorroborated testimony of Anthony Cataldo did not meet the exacting standards which would require the District Court to accept it as conclusive. His testimony was for the most part opposed to the probabilities, surprising, and even suspicious; and, it was oftentimes contradicted by legitimate inferences from the evidence. Under the circumstances, the District Court was amply justified in rejecting the testimony or finding it inadequate to sustain the taxpayers' burden. See *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891); *Baird v. C.I.R.*, 438 F.2d 490 (3d Cir. 1971); *Banks v. C.I.R.*, 322 F.2d 530, 537 (8th Cir. 1960); *Goldman v. C.I.R.*, 388 F.2d 476 (6th Cir. 1967); *Ballou v. United States, supra*. There is no rule which required the District Court to accept that Cataldo testimony, even if uncontradicted, at face value. *Purcell v. Waterman S.S. Corp.*, 221 F.2d 953 (2d Cir. 1955).

POINT III

In a refund suit the taxpayer has the burden of proof with respect to every claimed deduction.

The taxpayers charge the District Court with error for requiring that they bear the burden of proof with respect to every item claimed as a deduction. This is of some relevance in that the Government chose to contest the deductability of some expenditures which had been conceded by the Commissioner in his deficiency letter to the taxpayers. Because this case was tried as a refund suit and not on petition to the Tax Court, the Government was within its rights in putting all claimed deductions at issue and insisting that the taxpayers bear the burden of proof with respect to every item.

The right of the Government to depart from the Commissioner's deficiency letter apparently is not contested; nor could it be. For even the Tax Court has jurisdiction "to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount" set forth in the deficiency letter. 26 U.S.C. § 6214(a). It would be inconsistent to hold that the Government is bound by the deficiency letter in a refund suit. As already noted, the courts have long held that a refund suit is in the nature of an action for money had and received, *Lewis v. Reynolds, supra*, and therefore the taxpayer must demonstrate the correct amount of the tax that is due. *Helvering v. Taylor, supra*.

The precise question at issue is which party bears the burden of proof as to those expenditures which the Government did not previously dispute in the deficiency letter. In the Tax Court the answer is readily provided by Rule 32 of its Rules of Practice which states that in all matters the burden of proof is upon the taxpayer "except that in respect

to any new matter pleaded in his answer, it shall be upon the respondent." Rule 32, Rules of Practice before the United States Tax Court. Thus, it is not surprising to find the wealth of Tax Court cases * cited in appellants' brief for the proposition that the burden of proof was upon the Government (Appellants' Brief, pp. 15-16).

However, just the opposite is the rule in refund suits where "the burden [is] on plaintiff, in order to establish a basis for judgment in his favor, specifically to show not merely that the assessment was erroneous, but also the amount to which he [is] entitled." *Helvering v. Taylor*, *supra*, at 514. In refund suits where the Government asserts additional tax deficiencies by way of a set-off the burden falls on the taxpayer, not the Government, to prove the correctness of the challenged item. *Missouri Pacific Railroad Co. v. United States*, *supra* at 671 (Ct. Claims 1964). What is more, the Government need not even plead the additional tax deficiency either as a set-off or counterclaim. "The validity of any deduction claimed by the taxpayer in his income tax return is inevitably in issue in his action to recover alleged overpayments of income tax." *United States v. Pfister*, 205 F.2d 538, 542 (8th Cir. 1953). To prevail, the taxpayer must prove the legality and amount of any deduction even if not previously challenged by the Commissioner. *Ibid.* It has been explicitly held that when

* *Taylor v. Commissioner*, *supra*; *Weir v. Commissioner*, 283 F.2d 675 (6th Cir. 1960); *Herbert v. C.I.R.*, 377 F.2d 65 (9th Cir. 1966); *Bassett v. C.I.R.*, *supra*; *Hull v. C.I.R.*, 87 F.2d 260 (4th Cir. 1937); *Estes v. Hibbs*, 16 T.C. 535 (1951); *Tauber v. Commissioner*, 21 T.C. 179 (1955). Likewise, the quoted excerpt from 34 *Federal Taxation*, ¶ 9318 appears under the heading: "Presumption and burden of proof in the Tax Court." The only refund suit cited on this point, *Walsh v. United States*, 163 F. Supp. 421, 425 (D. Neb. 1958), is clearly inapposite. That case merely holds that the Government may not raise and argue a factual issue for the first time in its post-trial papers. Not surprisingly, the Court declined to consider that issue at such a late stage in the proceedings.

the Government chooses to assert a different theory or additional deficiencies in a District Court refund suit, the taxpayer has the burden of proof with respect to all disputed items. *David v. Phinney*, 350 F.2d 371, 374-75 (5th Cir. 1965); *Roybark v. United States*, 218 F.2d 164 (9th Cir. 1954); *William duPont, Jr. v. United States*, 64-1 U.S.T.C. ¶ 9023 (D. Del. 1963).

The only authority *contra* (not cited by appellants in their brief) are the District Court decisions, both of which fail to take note of the basic distinction between a Tax Court petition and a District Court refund suit. *Service Life Insurance Company v. United States*, 189 F. Supp. 282, 284 (D. Neb. 1960); *Massingale v. United States*, 59-1 U.S.T.C. ¶ 9298 (D. Ariz. 1959). All of the cases cited by the Court in *Service Life Insurance* involved Tax Court petitions. No authority was cited by the Court in *Massingale*.

Thus it did not suffice for the appellants to attempt to prove that the tax deficiency made by the Commissioner was arbitrary and capricious, and then rest. They were required to proceed farther and demonstrate the correctness of every claimed deduction.

POINT IV

The findings of the District Court disallowing various deductions claimed as ordinary and necessary business expenses were not clearly erroneous.

The Supreme Court has long recognized the inherent difficulty in declaring as a matter of law that any particular expenditure is an ordinary and necessary business expense under the tax code. In *Welch v. Helvering*, 290 U.S. 111 (1933) Justice Cardozo supplied his famous commentary on what constitutes an ordinary business expense:

"One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Id.* at 113.

Since that time no better formula has been devised, and the courts have uniformly embraced Justice Cardozo's teaching. But by recognizing that such determinations are almost always pure questions of fact, appellate courts have of necessity been compelled to accord great deference to the findings of the trier of fact. "Except where a question of law is unmistakably involved, a decision [of the trier of fact] . . . should not be reversed by the federal appellate courts." *Commissioner v. Heininger*, 320 U.S. 467, 475 (1943). Although contradictory findings may result from time to time, making it impossible to harmonize the cases, *Welch v. Helvering*, *supra* at 116, careful adherence to a principle of restricted appellate review "will result in a more orderly and uniform system of tax deductions in a field necessarily beset by innumerable complexities." *Commissioner v. Heininger*, *supra*; Cf. *Commissioner v. Duberstein*, 363 U.S. 278, 290-91 (1960). Thus the findings of the District Court must stand unless "clearly erroneous." Federal Rules of Civil Procedure, 52(a).

Despite this extremely limited scope of review, the taxpayers have attempted to reargue on appeal each item which was disallowed by the District Court as a business deduction. We deal briefly with their arguments. Fortunately, the numerous disallowed expenditures are capable of being grouped into five categories and will be discussed in the following order: (a) Apartment, Electricity and Gas; (b) Club Dues and Entertainment; (c) Petty Cash; (d) Case Charges; and (e) Interest and Contributions.

a. Apartment, Electricity and Gas

The taxpayers claimed a deduction of 50% of all payments for rent of the family apartment as well as for the monthly electric and gas bills. The Government conceded a deduction of 20% for the rent and electric bills, but contested the gas bills *in toto*. The Court found that the taxpayers were entitled to a 25% deduction for rent and electricity and to no deduction for gas.

The sum and substance of the husband's testimony was that he used each of the five rooms for his law practice (A122). He apparently used the apartment to write briefs at night and to meet with clients (A135). In a post-trial memorandum the taxpayers asserted that by 1963 the complexion of Mr. Cataldo's law practice had changed so that he was becoming more involved in personal as opposed to commercial legal matters. It was claimed that many of his new clients were neighbors in Forest Hills (A137). The Government submits that the Court was correct in rejecting the proposed rationale that the alleged complexion of the husband's law practice should govern the amount of the deduction to be allowed. The actual use of the apartment for business purposes controls.

Electricity was used throughout the apartment and therefore a 25% deduction was both logical and reasonable. However, the only gas outlets in the apartment were located in the kitchen (A134). One would hardly suppose the kitchen to be the nerve center of a busy law practice. No deduction should have been allowed.

b. Club Dues and Entertainment

The Government conceded and the Court allowed a business deduction for club dues paid to the Banker's Club, an eating facility for businessmen located in downtown Manhattan in the vicinity of the husband's law office. The Court properly disallowed a deduction for dues paid to the

West Side Tennis Club, the Atlantic Beach Club, the Men's Club of Forest Hills, the Women's Club of Forest Hill, Italy-American Chamber of Commerce and the Thomas Jefferson Democratic Club. The essence of the taxpayers' claim is that though these might appear to be purely social clubs, their facilities were used primarily as hunting grounds for the husband's law practice. On its face, this claim appears farfetched.* The little evidence that was offered in support of the claim reveals that family members other than the husband regularly used the club facilities (A157), that parties were given for large groups of neighbors who "might" become clients,** and that no systematic record of business use of the various clubs was maintained (A140, A158). The Regulations in effect at the time*** required that a continuous record be kept to demonstrate that a facility was used primarily for the furtherance of a trade or business. Income Tax Regulations, § 1.274-5(c)(6)(iii). If the taxpayer fails to maintain such records for a facility which is likely to serve personal purposes, "it shall be presumed that the use of such facility was primarily personal" *Ibid.*, and therefore not a deductible expense, 26 U.S.C. § 274(a)(1)(B). Even if the clubs were shown to have been used primarily for business purposes the taxpayers would not be entitled to any greater portion of the

* This is not to say that social club dues may never be lawfully claimed as a business deduction. In *Johnson v. United States*, 45 F. Supp. 277 (S.D. Cal. 1941), reversed on other grounds without consideration of point, 135 F.2d 180 (9th Cir. 1943) a lawyer was able to substantiate a deduction for golf club dues on facts far more compelling and on evidence far more detailed than present in this case.

** A New Year's Eve party at the West Side Tennis Club is illustrative. Of the twenty-one neighborhood guests invited only four or five were clients. The rest were "people who I expected to get business from like Mrs. Walsh. I did get her estate five years later" (A125-A126).

*** The regulations in effect during the tax year involved are found in Mertens, Federal Income Taxation (1961-1964 Regulations).

cost of club dues than was allocable to valid business uses. Income Tax Regulations, § 1.274-2(c)(6); *LaForge v. C.I.R.*, 434 F.2d 370, 373 (2d Cir. 1970).

As to the claimed entertainment expenses, the taxpayers failed either to produce credible evidence that these items were directly related to the active conduct of the husband's law practice, 26 U.S.C. § 274(a)(1)(A), or to substantiate the expenditures with adequate records, 26 U.S.C. § 274(d).

The testimony of the husband was extremely vague as to the business purpose of particular expenditures. In the almost complete absence of identifying receipts or other records it was not possible for the Court to conclude with any degree of certainty that the claimed entertainment expenses were "directly related to . . . the active conduct of the taxpayer's trade or business." 26 U.S.C. § 274(a)(1)(A). On this ground alone these items were properly disallowed.

But Section 274(d) of the Code further provides that no deduction for business entertainment expenses shall be allowed "unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his own statement" the amount of the expenditure, the time, date and place of the entertainment, its business purpose, and the business relationship to the taxpayer of the person entertained. 26 U.S.C. § 274(d).

For the most part the taxpayers were able to offer as substantiation only cancelled checks. The balance of the evidence consisted of a few uninformative bills, vouchers and chits. The oral testimony of Anthony Cataldo was uncertain and confusing as to whom was entertained and what business, if any, was discussed. The Court's finding that there was a failure of substantiation was not clearly erroneous.

The taxpayers raise two objections worthy of comment. The first is that the regulations have dispensed with a record-keeping requirement for expenditures less than \$25.00. The second point is that certain Revenue Rulings issued by the Commissioner in 1963 dispensed with the record-keeping requirements of Section 274 at least through July of that year. As to expenditures less than \$25.00 the Regulation, § 1.274-5(c)(iii), only dispenses with the requirement to maintain documentary evidence such as receipts, paid bills or similar evidence. The regulation does not relieve the taxpayer of the statutory obligation to substantiate the expenditure by other means. For all that appears in this record, the claimed expenditures less than \$25.00 could have been for the husband's lunch while dining alone or for a round of drinks for his family members. As to the alleged waiver of substantiation requirements, the cited revenue rulings were not so generous as the taxpayers would have the Court believe. Revenue Ruling 63-144 and Revenue Procedure 63-3 merely advise that reasonable doubts will be resolved in favor of taxpayers only "when there has been a good faith effort to apply the new substantive requirements with respect to travel and entertainment expenses incurred from January 1, to July 31, 1963." Mertens, Federal Income Taxation (1961-1965 Rulings) Revenue Rulings, pp. 477, 478; see also *Id.*, Revenue Procedures, pp. 137-138. In this case the Commissioner could easily conclude that there had not been a good faith effort to comply with the new record-keeping rules. The records kept by the taxpayers here were so scanty that they were hardly adequate to corroborate the husband's own sketchy testimony. *Sanford v. Commissioner*, 412 F.2d 201, 202 (2d Cir. 1969), *cert. denied*, 396 U.S. 841; *Andress v. Commissioner*, 51 T.C. 863, 869 (1969), *affirmed*, 423 F.2d 679 (5th Cir. 1970); *Steel v. C.I.R.*, 437 F.2d 71 (2d Cir. 1971).

c. Petty Cash

The taxpayers claimed a deduction for Petty Cash in the amount of \$3,823.78. It is undisputed that they failed to produce any significant evidence to document these expenditures. The husband merely offered in evidence four pages of note paper containing a listing of the amounts of expenditures and no other descriptive information (A269; Ex. 29 for identification). He stated generally that the expenditures were made for office stationery, tips, etc. (A300). The taxpayers rest their case on the fact that during the audit the Government had allowed \$2,230.23, constituting all petty cash items less than \$25.00 as set forth in the husband's office diary for 1963. The balance, \$1,593.55, was disallowed by the Appellate Conferee in the deficiency letter of September 22, 1967. As to this latter amount, the taxpayers appear to offer no argument.

The taxpayers claim that they were not able to substantiate the \$2,230.23 in petty cash disbursements because at some time prior to trial the husband's office diary was lost. It is the husband's belief that the diary went astray when he moved his office in June of 1972 (A268). This may well be the case but it does not suffice to relieve the taxpayers of their burden to establish by credible evidence that the expenses were in fact incurred and were ordinary and necessary business expenses. As demonstrated in Point III, *supra*, the burden of proof falls upon the taxpayers even though the items had previously been allowed by the Com-

The Government should not be estopped to dispute those petty cash expenditures which it previously had allowed. First of all, the taxpayers should have realized when they decided to bring this refund suit that as a matter of law they would have to prove *every* claimed deduction. Secondly, in the course of this litigation Government counsel has been at pains to emphasize that the taxpayers must meet

this heavy burden.* This factor, among others, was the basis of the Government's opposition to the taxpayers' motion for summary judgment made in December 1972. Third, as part of pre-trial discovery, the Government requested the production of the office diary in July 1971. When the taxpayers refused to produce the diary, Government counsel advised the husband that he would move at trial to preclude the introduction of any evidence relating to petty cash disbursements (A307d). By their obstreperous conduct, the taxpayers deprived Government counsel of the opportunity to review the diary and determine whether some, if not all of the previously conceded petty cash disbursements, could be stipulated to (A307b). If the subsequent disappearance of the diary has prevented them from making out their case, the taxpayers have only themselves to blame.

The taxpayers further argue that they were prevented from introducing secondary evidence in place of the diary. Such was not the case. The proffered "secondary evidence" was (a) the husband's testimony that he had made his office diary available to the I.R.S. during the audit period, and (b) the supposed testimony of Revenue Agent Robert Levine that he reviewed the diary in making up his report

* Appellants charge that Government counsel did not insist that all petty cash expenditures be proven until the loss of the diary became known. In an attempt to buttress this claim, they caused to be read into the record an interrogatory and the Government's answer thereto made in 1970. The interrogatory asks the Government to state "the name of the recipient, amount and date of payment of each item in the gross amount of \$1,593.55 disallowed as petty cash, travel and entertainment" (A6, A302). The response refers the taxpayers to the 1963 office diary, indicating that all items in excess of \$25.00 were disallowed (A7, A303). This obviously is not a concession in this litigation. It is merely a statement of what items were allowed by the Commissioner, prior to issuing the deficiency notice. Although the taxpayers could have framed their interrogatories to seek the contentions of the Government on this issue, they did not do so.

recommending that all items under \$25.00 be allowed. The husband's testimony was received (A298-99). Revenue Agent Levine, however, stated several times that he did not recall seeing an office diary (A275, A283). Instead, he made his recommendation on the basis of some "yellow cap paper" supplied by the taxpayer which was marked "Diary" and contained a listing of figures under the heading of petty cash (A279, A284, A288). The yellow cap paper did not provide descriptive information other than the amount of the disbursement (A280).

Because of a failure of proof, the Court correctly refused to allow any deductions for claimed petty cash expenditures.

d. Case Charges

Five case charges totalling \$1,279.13 were disallowed. A payment of \$225.00 to the firm of Raines & Gutman was described as an advance made on behalf of a client in settlement of a claim. Likewise, a payment of \$867.67 made to the National Surety Corp. was allegedly made by the husband as guarantor of the same client's bond. The husband testified—but offered no corroborating evidence—that he was never repaid for these advances (A196). The Court found on the limited evidence before it that these were not the ordinary and necessary business expenses of an attorney (A72-A73). They were, at best, personal loans which could be deducted as a loss in a late year if, in fact, they were then written off as uncollectible.

An advance of \$100.00 to pay the rent of another client was likewise disallowed. The taxpayers did not show that when this amount was paid back in 1964 that they included it as income (A231-235). The two remaining case charges were properly disallowed. There was no testimony—or even a cancelled check—to describe the alleged payment of \$36.45 to J. T. Thomassen (A231). The \$50.00 cash ex-

penditure of August 15, 1963 was described as pocket money used on a golfing date with three clients (A211). This is clearly covered by Section 274 and there was no substantiation as required by 26 U.S.C. § 274(d).

e. Interest Charges and Charitable Contributions

It was conceded by the Government that the taxpayers incurred interest charges of \$1,877.51 on loans taken out with the Marine Midland Bank and Manufacturer's Hanover Trust Company. However, the taxpayers failed to show that these loans were used for business purposes. Accordingly, interest charges were allowed only as an itemized deduction. This seems hardly subject to challenge in view of the absence of detailed or even generally informative testimony on what business uses the loans were put to. On cross-examination it developed that the taxpayers had considerable personal expenses in 1963 which most likely were met by the borrowed funds, *e.g.* the board and tuition of two daughters in college (A344-A345). On the basis of this limited evidence, the Court's finding that no business use was proven should not be disturbed.

Likewise, the charitable contributions of \$306.00 may only be allowed as an itemized deduction, not as a business expense. The Court properly disregarded the husband's testimony that he and his wife made contributions to charity only with the expectation that some business might come his way (A309). Section 162(b) of the Code prohibits the taking of such contributions as ordinary and necessary business expenses. 26 U.S.C. § 162(b). Only when the expenditure can be said not to constitute a disinterested contribution but rather a business payment, may a deduction under Section 162 be taken. The record compiled in this case in no way resembles the carefully documented pattern of business payments made by the taxpayer in *Sarah*

Marquis v. Commissioner, 49 T.C. 689 (1969). For this reason a deduction was allowable only under Section 170 of the Code, 26 U.S.C. § 170.*

POINT V

The taxpayers were afforded a fair trial.

Two and one-half trial days were consumed to hear this \$2,000 income tax refund suit. Had the Court allowed counsel for the taxpayers to conduct the trial in the manner he saw fit, it would have extended into a second week. Because of the disorganized manner in which the husband attempted to present the taxpayers' case and because of his insistence on pursuing irrelevant matters, it became necessary for the Court to introduce an element of order and structure into the trial (A114). The Court adopted the procedure of directing the husband's attention to a particular item disputed by the Government and asking him to provide what evidence he had that would support a deduction. Cross-examination was allowed as necessary and an immediate ruling was made. At the conclusion of plaintiffs' case, the Court invited the taxpayers to submit a memorandum setting forth any other matters which they intended to prove (A316, A317, A356). On May 31, 1973 the taxpayers submitted an 18 page memorandum (A12-A29) which was supplemented by an affidavit and notice of motion two days later (A39-A43). Opposing papers were submitted by the Government and the Court ruled on June 13, 1973 that no new relevant material was being offered

* The taxpayers claimed additional cash contributions of \$547.00 as an itemized deduction under Section 170. The husband's recollection of these payments did not inspire confidence and there was no documentary evidence offered in corroboration. Not even the wife, who was alleged to be the donor in many instances, was called to testify (A318-A334). All claimed cash contributions were disallowed (A80).

(A34-A38). After affording both sides ample opportunity to submit proposed findings, the Court issued its Opinion, Findings of Fact and Conclusions of Law on June 29, 1973 (A44-A86).

The many charges made in taxpayers' brief against Judge Levet, his law clerk and Government counsel relating to the conduct of the trial are either trivial, intemperate or not worthy of comment. A fair reading of the transcript compels the conclusion that the husband's comportment was disruptive to the conduct of an orderly trial. It resulted in the Court adopting a structured, but fair, procedure for the posing of questions and answers. It necessitated the Court calling upon his law clerk for assistance in keeping tab of the innumerable expenditures which had to be ruled on. It necessitated that Government counsel object when irrelevant evidence was offered or erroneous claims were made.* Finally, the husband's persistence in refusing to abide by the Court's directions resulted in a finding of contempt and a fine of \$50.00.

The taxpayers failed to prevail in the District Court not because of any lack of opportunity to be heard, but because they did not come forward with adequate proof to sustain their claim. It would be an abuse of discretion to remand this case for another trial in the District Court. One such ordeal is more than enough.

* Although Government counsel was usually sustained on the law, the taxpayers' charge that he deliberately made incorrect statements of law to the Court. (Appellants Brief, p. 63). This is certainly an unusual method of disputing an opposing party's legal argument. The far more reckless charges concerning the subornation of perjury are refuted by the record (A273-A295) and nothing more need be said.

POINT VI

The repeated refusal of the attorney-taxpayer to abide by the directions of the court constituted contempt.

The record of the trial in this case is replete with the obstinate and disruptive behaviour of the attorney-taxpayer who represented himself *pro se* and his wife. The Court, on several occasions, admonished counsel not to interrupt when it was speaking and not to persist in arguing after rulings had been made (A89-90, A94, A117, A121, A137-A138, A143). Such basic rules are not only conducive to an orderly trial, they are essential to insure that the proceedings do not degenerate into a shouting match. Because of the husband's refusal to pay heed to the Court's directives he was held in contempt and fined \$50.00 (A150).

This Court has recognized that the contempt sanction is available to prevent abuses which disrupt the orderly conduct of a trial. *United States v. Galante*, 298 F.2d 72 (2d Cir. 1962) (persistence of defendant in addressing the Court). This is true even when the contemptuous conduct is that of a lawyer done in the course of representing his client. *United States v. Schiffer*, 351 F.2d 91, 94 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966). Although the mere transgression of an order governing trial procedure is usually insufficient to sustain a contempt conviction, a persistent disregard for the Court's authority that the attorney could have avoided, through a reasonable, good faith effort does constitute contempt. *Weiss v. Burr*, 484 F.2d 973, 981 (9th Cir. 1973). If it can be said that the attorney's conduct here "actually obstructed the district judge in 'the performance of judicial duty'", then the contempt order was warranted. *In re McConnell*, 370 U.S. 230, 234 (1962).

The insistence of counsel in arguing every minor point after adverse rulings had been made resulted in the prolongation of trial. Further, counsel's frequent interruptions made it almost impossible for the Court to hear testimony and make rulings in an orderly manner on the innumerable claims for deductions. Considering the many warnings that had been given, the summary finding of contempt was warranted.

Although the contempt order recites that it is for civil contempt, it is clear that what is involved is a summary criminal contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.* The Rule provides that the judge certify the contemptuous conduct which was committed in his presence. The contempt order here fully complies with the Rule (A8). Although there is no right to be heard when the Court proceeds by summary contempt, *Weiss v. Burr*, *supra*, the Court invited Mr. Cataldo to show why he should not be fined (A137) and whether there was any reason for this fine to be remitted (A355-A356, A10-A11). The fine of fifty dollars is hardly excessive. See *In re Gates*, 478 F.2d 938 (D.C. Cir. 1973) (attorney fined fifty dollars for delaying the start of a trial by being otherwise occupied before a Magistrate).

* A civil contempt order is contingent, coercive and remedial in purpose. *I.B.M. v. United States*, — F.2d — (2nd Cir., Dec. 17, 1973) (Docket Nos. 1133-6) Slip Op. 5628-5633, *cert. denied*, — U.S. — (May 13, 1974). Such was not the case here.

CONCLUSION

The judgment of the District Court should be affirmed and the taxpayers' appeal dismissed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for Appellee,
United States of America.*

May 15, 1974

T. GORMAN REILLY,
DAVID P. LAND,
*Assistant United States Attorneys,
Of Counsel.*

such a case any attempt at a retroactive determination would be sheer speculation. The Supreme Court has on more than one occasion discussed the difficulty of retroactively determining an accused's competence to stand trial. *Pate v. Robinson*, *supra*; *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed.2d 824 (1960). After a review of the record the district court determined that a retroactive determination could not be made and ordered a new trial. Based on the facts and the applicable standards the district court's determination was not clearly erroneous and we affirm its order.

Judge Meredith carefully set forth the facts and the law relating thereto in his opinion. We believe that he has correctly decided the case. The judgment is therefore Affirmed.



Anthony B. CATALDO and Ada W. Cataldo, Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 1105, Docket 73-2602.

United States Court of Appeals,
Second Circuit.

Argued May 30, 1974.

Decided June 25, 1974.

A claim for an income tax refund was filed. The United States District Court for the Southern District of New York, Richard H. Levet, J., entered judgment denying claim, and taxpayers appealed. The Court of Appeals held that where in proceedings on claim for income tax refund a judgment holding one taxpayer in contempt was filed, Court of Appeals had no jurisdiction to undertake review of contempt judgment,

where no appeal had been taken from it, even though taxpayers, who had appealed from judgment denying their claim for income tax refund, proffered various arguments attacking validity of contempt judgment.

Judgment affirmed.

Internal Revenue §2207.1

Where in proceedings on claim for income tax refund a judgment holding one taxpayer in contempt was filed, Court of Appeals had no jurisdiction to undertake review of contempt judgment, where no appeal had been taken from it, even though taxpayers, who had appealed from judgment denying their claim for income tax refund, proffered various arguments attacking validity of contempt judgment.

Anthony B. Cataldo, for plaintiffs-appellants and pro se.

T. Gorman Reilly, Asst. U. S. Atty., New York City (Paul J. Curran, U. S. Atty., for the S. D. N. Y., New York City, and David P. Land, Asst. U. S. Atty., of counsel), for defendant-appellee.

Before MOORE, FRIENDLY and FEINBERG, Circuit Judges.

PER CURIAM.

This is an appeal from a judgment of the United States District Court for the Southern District of New York, denying appellants' claim for an income tax refund for the year 1963. Appellants have broadly attacked the decision of the District Court and the fairness of the proceedings before it. We have carefully considered the record and the transcripts of that trial and the briefs submitted to us by the parties and have concluded that appellants were afforded a fair trial and that the District Court did not err in finding for the Government. We therefore affirm.

In the course of the proceedings in the District Court, appellant Anthony B.

4 518 397

UNITED STATES v. ABRAMSON

Cite as 501 F.2d 397 (1974)

Cataldo was summoned to show cause why he should not be held in contempt.¹ A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack jurisdiction to undertake its review.

Judgment affirmed.



UNITED STATES of America,
Appellant,

v.

Max ABRAMSON et al., Appellees.

UNITED STATES of America,
Appellant,

v.

John SALANITRO et al., Appellees.
Nos. 73-1668, 73-1667.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 11, 1973.

Decided July 29, 1974.

In prosecution for violations of interstate gambling laws, the United States District Court for the District of Nebraska, Richard E. Robinson, J., granted defendant's motion to suppress all evidence from wire interception and government appealed. The Court of Appeals for the Eighth Circuit held that

1. Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed.

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

executive assistant to Attorney General was not empowered to authorize applications for wiretap orders.

Affirmed.

Telecommunications §496.

Executive assistant to Attorney General could not authorize applications for wiretap orders. 18 U.S.C.A. §§ 2510-2520, 2516.

William K. Schaphorst, U. S. Atty., Omaha, Neb., for appellant.

Oscar B. Goodman, Las Vegas, Nev., for appellees.

Before GIBSON and ROSS, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

PER CURIAM.

The cases before us, consolidated for purposes of review, present for decision one common issue, namely, the suppression of evidence obtained through wiretaps. We will confine our ruling to this issue, noting only, as to the charges made, that various violations of law pertaining to interstate gambling offenses were alleged.¹

Subsequent to the Government's notification that it intended to use at trial evidence obtained from wiretaps conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, defendants moved to suppress all evidence from the wire interception. Such motion was granted by the District Court, and the Government appeals under 18 U.S.C. §§ 3731 and 2518(10)(b).

1. Defendants Salanitro, Sirian and Howard were charged with conspiring to use a facility in interstate commerce to conduct an illegal gambling business in violation of 18 U.S.C. § 1952 and conspiracy to transmit gambling information in interstate commerce over wire communications facilities in violation of 18 U.S.C. § 1084, as well as a substantive crime under 18 U.S.C. § 1955.

Defendants Abramson, Grooms, Wisniewski, and Quinn were also charged under 18 U.S.C. §§ 1952, 1084 and 1955.

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UNITED STATES DISTRICT COURT

~~JUDGE SANHALL~~

jury demand date: 9/2/69 by Deft.

D. C. Form No. 106 Rev.

TITLE OF CASE

~~JUDGE SANHALL~~
JUDGE LEVET~~JUDGE SANHALL~~
JUDGE SANHALLANTHONY B. CATALDO
ADA W. CATALDO

VS.

UNITED STATES OF AMERICA

For plaintiff:

ANTHONY B. CATALDO PRO. SE
52 Wall St.
New York 10005

For defendant:

United States Attorney (Richard S. Rudick)
S.D.N.Y. U.S. Court House, Foley Sq. NY 10007
264-6337

STATISTICAL RECORD		COSTS	DATE	NAME OR RECEIPT NO.	REC.	DUES.
J.S. 5 mailed	X	Clerk	1-31-69	A. CATALDO	15	-
			2-4-69	C. S. TREAS.		15
J.S. 6 mailed	✓	Marshal	2-11-71	B. TREAS.	50	-
			1-5-72	C. TREAS.	5	150
Basis of Action:		Docket fee	3-16-72	C. TREAS.	5	-
To recover sums of money		Witness fees	4-15-72	C. TREAS.	5	-
assessed against plt.'s			4-15-72	C. TREAS.	5	-
\$2,718.49			4-15-72	C. TREAS.	5	-
Action arose at:		Depositions	4-22-72	C. TREAS.	5	-

Exhibit J

69 Civil 407 Anthony B. Cataldo & Ada Cataldo vs. U.S.A. 69 Civil 407

PRO SE

JUDGE LEVET

JUDGE LEVET PRO SE

DATE	PROCEEDINGS	Date Order or Judgment Noted
Jan. 31-69	Filed complaint and issued summons	
Feb. 24-69	Filed summons and return Served the United States of America mailing to the Atty Gen., Wash, D.C. by Certified mail receipt # 559295 - United States of America by Pauline Trois, Clerk in the U.S. Attys Office S.D.N.Y. on Feb. 11.69	
Sept. 2-69	Filed ANSWER to complaint and Jury Demand.	US Atty
Oct. 14/69	Filed Defts notice to take deposition of Pltff.	
Oct. 30-69	Filed Plaintiff's Interrogatories.	
Feb. 13, 70	Filed pltff's Affidavit and notice of motion Re; Strike Answer Ret. 2-19-70	
Feb. 17-70	Filed Answers to Interrogatories.	
Apr 3- 70	Filed Memo Endorsed on motion papers filed Feb 13-70, "Inasmuch as deft has belatedly served its answers to pltff's interrogs, this motion to strike defts' answer because of its failure to answer the interrogs will be denied. The pre-Trial Examiner has informed the Court, however, that certain of the answers to interrogs are unsatisfactory. In an effort to avoid further motions and to save time for all concerned, the parties are directed to produce all their books and records before Pre-Trial Examiner Potter at 10 am on 4-16-70 and to confer with him with a view to clarifying deft's answers to the interrogs and defining the issues to be tried ----So Ordered: McLean, J." ---Special Master's Report by Potter annexed hereto. m/n	
Aug. 4-70	Filed deft's res ponse to pltff's exceptions.	
12-11-70	Filed Pltff's exceptions to deft's responses to interrogatories	
12-11-70	Filed pltff's demand	
Dec. 4-70	Filed 2nd MeMo Endorsed on Notice of Motion filed 2-13-70. Pltffs' motion is denied and their objections to deft's answers to their interrogatories are overruled. So. Ordered: McLean, J. M/N	
Dec. 11-70	Filed pltff's Notice of Motion Re: Reargument Ret. 12-17-70.	
Dec. 11-70	Filed pltff's Memorandum on motion for reargument.	
Dec. 16-70	Filed deft's Memorandum of law in opposition to pltff's motion for reargument	
Dec. 21-70	Filed Memo Endorsed on notice of motion filed 12-11-70--Motion for reargument denied. So Ordered: McLean, J.	
Jan. 7-71	Filed pltffs' notice to take deposition of deft on 1-22-71	
Jan. 26-71	Filed pltffs' notice to admit	
Jan. 26-71	Filed order that pltffs' scheduled deposition is adjourned to the 8th of February 1971 at 10 o'clock A.M. at the office of the Clerk of the Court, Foley Square, NYC, NY Cannella, I. M/N	
Feb. 26-71	Filed deft's Response To Request For Admissions	
Apr. 29-71	Filed deft's written interrogs. and request for documents.	
Jun 16-71	Filed pltffs interrogs.	
Sep. 22-71	Filed pltff's notice of motion. Re: Compel appearance. Ret. 9-30-71	
Sep. 29-71	Filed deft's affidavit in opposition to pltffs motion to impose sanctions.	
Sep 30-71	Filed memo endorsed on motion filed 9-22-71---Motion is withdrawn as the parties have agreed to set deposition of the examiner down for 10-13-71 etc.---So ordered- Ryan, J. m/n	
Nov. 19-71	Filed pltff's notice of motion. Re: Summary Judgment. Ret. 12-7-71.	
Jan 4-72	Filed brief of the pltffs on their motion for summary judgment.	
Jan 10-72	Filed deft's statement of material facts at issue.	
Jan 10-72	Filed affidavit in opposition to pltffs' motion for summary judgment.	
Jan 10-72	Filed deft's memorandum of law in opposition to pltffs' motion for summary judgment.	

CONTINUED

69 Civil 407 Anthony B. Cataldo vs. U.S.A.

JUDGE RUFFY

A 501

D. C. 119 Rev. Civil Docket Continued

JUDGE RUFFY

69 Civil 407

JUDGE LEVET

DATE	PROCEEDINGS	Date Order or Judgment Noted
Jan 17-72	Filed MEMO. ENL. on motion filed 11-19-71 The motion for summary judgment is denied. Weinfeld J. -mailed notice.	
Jan 17-72	Filed def't's NOTE OF ISSUE and statement of readiness.	
Feb. 23-72	Filed Deposition of def't., by Robert Levine, taken by pl'tff; -mailed notice.	
May 10, 73	Non-jury trial begun and cont'd/ before LEVET, J.	
May 11, 73	Trial cont'd.	
May 14, 73	Trial cont'd and Concluded. Dec. Res.	
May 18, 73	Filed ORDER: Adjudged that Anthony B. Cataldo is guilty of contempt of court, and it is further ADJUDGED that the said Anthony B. Cataldo be fined the sum of Fifty (\$50.00) dollars. LEVET, J. and Clerk	
May 25, 73	Filed Govt. supplemental memo.	
Jun. 13, 73	Filed MEMO: At the completion of the trial of this action the court granted leave to pl'tffs. to submit papers in support of motion to amend comp. to include items pl'tffs. contended were not covered at trial. *** Pl'tffs. motion to amend comp. is denied and the trial is not to be reopened. (See memo for dealings with each item which pl'tffs. allege in support.) (6 Pages) SO ORDERED. KNAPP, J. N/M by Pro Se	
Jun. 12, 73	Filed MEMO. Pl'tff. motion to amend the comp. to assert a defense based upon the U.S. alleged failure to make a timely assessment is denied. SO ORDERED. LEVET, J. (n/m by Pro Se).	
Jun. 27, 73	Filed MEMO: Pl'tff. pursuant to an affdvt. received 6/25/73, seek to reopen the trial to introduce alleged evidence concerning handwritten notes by I.R.S. Agent Robert Levine. The admissibility of such evidence was considered at trial and deemed irrelevant. This court maintains such ruling. Pl'tff. motion is denied. SO ORDERED. LEVET, J. (n/m by Pro se)	
Jun. 28, 73	Filed Filed pl'tffs. proposed findings of facts and conclusions of law.	
Jun. 29, 73	Filed Supplemental affdvt in support of pl'tff motion for judgment.	
Jun. 29, 73	Filed Summary of def'ts. positions in disallowing certain expenses. By Pl'tff.	
Jun. 29, 73	Filed pl'tffs. list of claimed expenditures.	
Jun. 29, 73	Filed pl'tffs. affdvt. Re: adjourning one week.	
Jun. 29, 73	Filed Def'ts. trial memo.	
Jun. 29, 73	Filed def'ts. Reply memo.	
Jun. 29, 73	Filed pl'tffs. affdvt. and notice of motion, Re: supplement statement of issues or amend comp.	
Jun. 29, 73	Filed pl'tffs. memo of issues.	
Jun. 29, 73	Filed govt. memo in opposition to pl'tffs. application to submit further evidence.	
Jun. 29, 73	Filed memo of pl'tffs in opposition to def'ts. claims regarding petty cash disbursements.	
Jun. 29, 73	Filed pl'tff. trial memo.	
Jun. 29, 73	Filed def'ts. memo in ipposition to pl'tffs. motion to amend comp.	
Jun. 29, 73	Filed def'ts. reply memo.	
Jun. 29, 73	Filed pl'tff. affdvt. Re: additional offers of proof.	
Jun. 29, 73	Filed pl'tffs. post trial memo.	
Jun. 29, 73	Filed OPINION # 39645- Findings of fact and conclusions of law. *** This Court has jurisdiction over the subject matter and the parties to this action. Pl'tffs. are not entitled to a tax refund for the year 1963. Judgment is granted to the U.S.A. dismissing the comp. with prejudice. Costs of the action are awarded to the U.S. Settle judgment on notice in accordance herewith. LEVET, J. (43 Pages)(n/m by pro se)	

Cont'd on page #4

A

502

JUDGE LEVET

69 Civ 407 Anthony B. Cataldo, etano vs. U.S.A.

Page 4

69 Civ 40

DATE	PROCEEDINGS	Date Order of Judgment Noted
	& Judgment:	
Jul.17-73	Filed Order that pltrf's take nothing, that judgment is hereby granted , to the deft. & complaint is dismissed with prejudice, Costs of this, action, as fixed by the clerk of the court, are awarded to deft. Levett, J. Judgment Ent. Clerk. No appearance in opposition. , Bill of costs taxed in favor of U.S.A on 7-17-73 in the amount of, \$104.00 & docketed as Judgment #73,613.	
Jul.17-73	Filed Bill of Costs in the sum of \$104.00 & docket as Judgment , #73,613.	
Jul 19-73	Filed notice of entry copy of judgment and bill of costs dtd 7/17/73.	
Sep.17-73	Filed pltrf's notice of appeal from final judgment dismissing this action entered on 7-17-73. Mailed copy to U.S. Attorney.	
Sep.28-73	Filed transcript of xxxxxx record of proceedings of 5-11-73.	
Oct. 31-73	Filed transcript of record of proceedings, dated <i>May 10, 11 14 1973</i>	
Dec.7-73	Filed Bond undertaking for costs on appeal in the sum of \$250.00, by National Surety Corp.	
Nov.29-73	Filed notice that record on appeal has been certified & transmitted to the U.S.C.A.	
Sep.17-74	Filed True copy of Mandate & order from the USCA: Ordered that the, judgment of District court is affirmed with costs to be taxed, against the appellants. Docketed as judgment #74,745 on sept.18-74. Statement of costs attached in the sum of \$323.64. Ent.9-23-74.	
Oct.11-74	Filed affidavit of David P. Land in opposition to motion by Anthony B. Cataldo Re: contempt fine.	
Oct.17-74	Filed Memo-Decision #41316: Anthony B. Cataldo was in contempt by reason of his acts during the trial. A contempt fine of \$50 was imposed. Pltrf moved for an order remitting the penalty. I see no basis whatsoever for the granting of the application made by Cataldo. It is therefore denied. So ordered. Levett, J.	
Oct.10-74	Filed pltrf's affidavit & notice of motion to remit the penalty.	
Oct.10-74	Filed pltrf's brief in support of his motion RE: penalty.	
Nov.15-74	Filed pltrf's notice of appeal to the USCA from order of Oct.17-74 denying his motion to vacate the order of contempt. Mailed copy to U.S. Attorney.	
Dec.17-74	Filed deft's affidavit & notice of motion to dismiss notice of appeal filed by pltrf's on 11-15-74 (This motion received in chambers on 11-22-74.	
Dec.17-74	Filed affidavit by A.B. Cataldo in opposition to deft's motion to dismiss appeal.	
Dec.17-74	Filed Memo-endorsed on deft's motion to dismiss notice of appeal. Motion withdrawn. See motion by U/S attorney dated 12-12-74. So ordered. Levett, J.	
Dec.17-74	Filed deft's notice withdrawing motion.	
Dec.13-74	Filed notice that the record on appeal has been certified & transmitted to the USCA on this 13th day of Dec. 1974.	
04-21-75	Filed Pltrf's Notice of Appeal from order denying pltrf's motion to vacate order of contempt of 5/18/73, etc. (mailed notice to Hon. Paul J. Curran, 4/22/75)	
05-28-75	Filed True copy of USCA Order that the order of Dist Court, is affirmed. Judgment Ent. Clerk. m/n	
06-02-75	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.	
07-03-75	Filed pltrf's Amended notice of appeal to the USCA from order of Judge Levett filed 5-18-73, holding him for contempt. Mailed Copy to U.S. Attorney.	
08-11-75	Filed Notice that suppl. record on appeal has been certified & transmitted to USCA.	

Cont't on page #5

A 583

69 Civ 407 Anthony B. Vataldo, etano vs. U.S.A.

69 Civ 40

D. C. 110 Rev. Civil Docket Continuation

Page #5

Leach

DATE	PROCEEDINGS	Date Judge
03-03-76	Filed True copy of order from the USCA: Ordered that the appeal is	
	dismissed . We have hear argument on the merits of the contempt	
	citation & can find no sufficient reason to distrub the judgment	
	of the district court. Moore, J., Feinberg, J. & Oakes, J.	

2/22/77
agm

A TRUE COPY
RECEIVED
[Signature]